

## MODERN ISSUES IN CREATING AND IMPLEMENTING A SECTION 504 PLAN

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**A note about these materials:** These materials are not intended as a comprehensive review of all case law or rules on the various Section 504 topics addressed, but as a review of the thought process involved in making Section 504 Plan decisions. The materials and any related PowerPoint or presentation by the author related to these materials are not intended as legal advice, and should not be so construed. State law, local policy and unique facts make a dramatic difference in analyzing any situation or question. Please consult a licensed attorney for legal advice regarding a particular situation. References to the U.S. Department of Education will read “ED.”

In addition to the Section 504 regulations, IDEA and §504 cases, and OCR Letters of Finding, these materials will also cite guidance from two important OCR documents. First, a Revised Q&A document has been posted on the OCR website since March of 2009 addressing some of the ADAAA changes. This document, *Protecting Students with Disabilities: Frequently Asked Questions about Section 504 and the Education of Children with Disabilities* (March 27, 2009, last modified October 16, 2015), is available on the OCR website at [www.ed.gov/about/offices/list/ocr/504faq.html](http://www.ed.gov/about/offices/list/ocr/504faq.html) and is referenced herein as “Revised Q&A.” In January 2012, OCR released a guidance document on the ADAAA and its impact on Section 504. The “Dear Colleague Letter” consisted of a short cover letter and a lengthy new question and answer document. *Dear Colleague Letter*, 112 LRP 3621 (OCR 2012)(hereinafter “2012 DCL”).

### **I. The Section 504 Free Appropriate Public Education (FAPE).**

#### **A. §504 is a civil rights statute.**

The single paragraph we now refer to as §504 of the Rehabilitation Act provided that

“No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service....” —29 U.S.C. § 794(a) (1973).

In §504, the focus is on non-discrimination. As applied to the schools, the language broadly prohibits the denial of public education participation, or enjoyment of the benefits offered by public school programs because of a child’s disability. The law recognizes that disability can mean that equal treatment and equal services may not be sufficient to convey equal opportunity to benefit. For some §504-eligible students, equal opportunity to participate and benefit requires services and accommodations from the school to level the playing field. Services and accommodations, then, have a direct relationship to evaluation data demonstrating disability-related need. These materials are designed to address that relationship, focusing on the need for appropriate data to understand student need, and restraint when providing services so as not to over or under-serve. After all, the goal is a level playing field.

**The Section 504 FAPE is focused on leveling the playing field.** “For the purpose of this subpart, the provision of an appropriate education is **the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met** and (ii) are based upon adherence to procedures that satisfy the requirements of Sec. 104.34, 104.35, and 104.36.” 34 CFR §104.33(b) (emphasis added). For example, consider this language from OCR with respect to the duty to protect students with allergies at school.

**A right to an equally safe environment.** *Washington (NC) Montessori Public Charter School*, 60 IDELR 78 (OCR 2012). In response to a complaint by a student with a severe allergy to peanuts and tree nuts, OCR reminds schools of the nondiscrimination duty as it pertains to student safety. Following a brief overview of the relevant nondiscrimination provisions, OCR provided the following:

“OCR interprets the above provisions to require that public schools take steps that are necessary to ensure that the school environment for students with disabilities is as safe as the environment for students without disabilities. **As the vast majority of students without disabilities do not face a significant possibility of experiencing serious and even life-threatening reactions to their environment while they attend school, Section 504 and Title II require that the School provide students with peanut and/or tree nut allergy (PTA)-related disabilities with a medically safe environment in which they do not face such a significant possibility.** Indeed, without the assurance of a safe environment, students with PTA-related disabilities might even be precluded from attending school, i.e., may be denied access to the educational program.

To provide students with PTA-related disabilities with FAPE and meet the standards referred to above, the School must have a plan to meet those students’ needs that is based on individualized consideration of their needs. A plan that meets the students’ needs should take into account procedures that limit or prevent the risk of exposure to the allergens in each type of school program or activity in which the students participate, including in classrooms and common areas, the gymnasium, cafeteria, and hallways, and during recess, extracurricular activities, field trips, and school-related activities. The plans should also set out procedures to follow when the students are exposed to allergens.” (Emphasis added).

*See also the very similar language in an earlier OCR letter, Saluda (SC) School District One*, 47 IDELR 22 (OCR 2006).

## **B. Elements of the Section 504 Free Appropriate Public Education (FAPE).**

Each District has the duty to provide a FAPE to each qualified disabled person (each student who is both disabled and in need of services from the school) regardless of the severity of the student’s disability. §104.33(a). A FAPE has several distinct parts: (1) it is education provided at no cost to the parents, (2) it is designed to provide educational benefit despite the child’s disabilities, [it is “appropriate”] and (3) it is provided in the environment that affords the greatest exposure to non-disabled peers.

**1. No cost to the Parents.** Simply put, this provision of FAPE mandates that the **educational costs to be paid by parents of a student with a disability attending public school are no different than those paid by parents of nondisabled students.** So, while the school cannot charge the disabled child or her parents for highlighted textbooks or special manipulatives required by her disability for her to receive educational benefit, it may charge her for items for which all students are charged (costs of field trips, tickets to football or basketball games, purchase price of school uniforms, yearbooks, class pictures, etc.). §104.33(c)(1).

**2. Appropriate Education.** Under the regulations, an appropriate education is a blend of regular or special education and related aids and services created specifically for this student which is designed to meet his needs as adequately as the needs of nonhandicapped persons are met, and which satisfies the requirements for least restrictive environment, proper evaluation and placement, and procedural safeguards. §104.33(b)(1). More succinctly, it is a program created and maintained pursuant to the procedural requirements of the regulations that gives the student with disability an equal opportunity to participate and benefit.

A Section 504 Services Plan is created for the §504 student. This plan can have many names, including the simplest– 504 plan. The plan provides accommodations and services so that the student has equal access to the educational benefits of the school’s programs and activities. **The District cannot delegate away its responsibility to provide a FAPE.** Even if it chooses to place the §504 child outside the District, (which should rarely, if ever, occur) the District and not the entity where the child was placed, bears ultimate responsibility for providing the FAPE. §104.33(b)(3).

**Instruction in all grade-level curriculum.** While curricular modifications may be available to a special education student (i.e., reduced mastery of the grade level curriculum), **there is no modification of the curriculum itself for §504 students.** §504 is not about reducing expectations for disabled students, but providing the types of accommodations and services that will compensate for students’ disabilities so that §504 students have an equal chance to participate and benefit in the school’s programs and activities. Further, modifying the curriculum is potentially disastrous for §504 students in states where graduation is conditioned on passing a competency test based on the state-mandated curriculum. The failure to expose §504 students to the required curriculum hardly gives them an equal opportunity to earn a diploma.

**Behavior Management Plans.** Should the student exhibit behaviors that impede the student’s learning or that of others, and do not seem to be diminishing under the regular discipline management plan, the behaviors need to be addressed as part of the student’s Section 504 Plan. Once in place, the Section 504 plan (with the behavior management plan component) must be followed to avoid violation of federal law. Failure to have appropriate behavior management in place where required is not only a violation of federal law, it may also prevent the school from moving the student to a more restrictive setting because the District will be unable to demonstrate that the student could not be served in the regular education classroom with appropriate accommodations and services because the plan did not address the behaviors or was not implemented with respect to the behaviors. *See, for example, C.F. v. New York City Dept. of Educ.*, 62 IDELR 281 (2<sup>nd</sup> Cir. 2014)(Behavior intervention plan was faulty, due to vague language, and because it merely listed strategies and student behavior, but “failed to match strategies with specific behaviors.”).

**3. Least Restrictive Environment.** The least restrictive environment is the setting that allows the disabled student the maximum exposure to nondisabled peers while still allowing him to receive an appropriate education. §104.34(a)(1). The presumption is that the disabled child will be educated with regular education children. §104.34(b). **§504 presumes a regular classroom placement for the child (or education in the mainstream).** This presumption also exists in IDEA, but is even stronger in §504 since the disabilities encountered in §504 students are typically less severe. A placement other than the regular classroom is only appropriate if the disabled child cannot be educated satisfactorily in the regular classroom with supplementary aids and services such as a behavior management plan, classroom modifications, assistive devices, counseling, etc. §104.34(a).

**4. Plans are created pursuant to the Section 504 Process.** *See, for example, Tyler (TX) ISD*, 56 IDELR 24 (OCR 2010)(“In relying on an individualized healthcare plan and not conducting an evaluation pursuant to Section 504, the TISD circumvents the procedural safeguards set forth in Section 504.”); *Dracut (MA) Public Schools*, 110 LRP 48748 (OCR 2010)(“A significant distinction between serving the Student on a Section 504 Plan which references a Health Plan, versus a health

plan alone, is that the Student without the Section 504 Plan does not have any of the procedural protections that he is afforded under Section 504.”). A 2011 letter of finding from Virginia simply declares that when an eligible student has a health plan, he is receiving services under Section 504.

“The Division states there is no reference to a Health Treatment Plan in any part of the June 2009 IEP. There is only a reference of ‘cool temps’ on the testing accommodations sheet and documentation of the ice pack use in a daily log. Because the Division did provide some evidence that it was complying with the Health Treatment Plan in assisting the Student with body temperature regulation, OCR finds there is insufficient evidence of a violation of Section 504. **However, OCR cautions the Division that, where any student with a disability has a health plan in place in order to address the impact of a disability, OCR considers this student to be receiving services under Section 504, whether or not the health plan is formally incorporated into an IEP or Section 504 Plan.** Thus, the student’s health plan is to be developed and implemented according to the requirements of Section 504, and the student and his or her parents are entitled to Section 504’s procedural safeguards with regard to the health plan.” *Prince William County (VA) Public Schools*, 111 LRP 49536 (OCR 2011)(emphasis added).

### C. §504 Evaluation basics

**The §504 Committee knowledge requirement emphasizes the data-services link.** The school must ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. §104.35(c)(3). Do not be confused by the word “placement.” In the §504 context, **“placement” typically means the regular education classroom with individually planned accommodations and services.** The knowledge required of the folks that identify the student as eligible and determine placement (or services) for the student demonstrates the importance placed on understanding student need and data as a prerequisite for providing services under §504.

**Evaluation precedes eligibility, and precedes the delivery of services.** The §504 regulations require that the school evaluate the student “before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement.” §104.35(a). In other words, there are no initial services without an evaluation, nor changes in the services provided under §504 without a re-evaluation. The rationale is quite simple: without data we do not know whether the student is eligible, nor do we know how to serve him (how does the disability impact his ability to access the school’s programs and activities?). The law looks to need arising from disability and focuses services and accommodations on meeting that disability-generated need.

**“Evaluation” does not necessarily mean “test.”** In the §504 context, “evaluation” refers to a gathering of data or information from a variety of sources so that the committee can make the required determinations. §104.35(c)(1). Since specific or highly technical eligibility criteria are not part of the §504 regulations, **formal testing is not required to determine eligibility.** *Letter to Williams*, 21 IDELR 73 (OCR 1994). Common sources of evaluation data for §504 eligibility are the student’s grades, disciplinary referrals, health information, language surveys, parent information, standardized test scores, teacher comments, etc. If formal testing is pursued, the regulations require that the tests are properly selected and performed by trained personnel in the manner prescribed by the test’s creator. §104.35(b)(2). When interpreting evaluation data and making placement decisions, the District is required to **“draw upon information from a variety of sources,** including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior.” Information obtained from all such sources is to be documented and carefully considered. §104.35(c)(1)&(2). “[This] paragraph requires a recipient to draw upon a variety of sources in the evaluation process so that the possibility of error in classification is minimized.” Appendix A, p. 430.

**A comprehensive periodic re-evaluation is required for each eligible student.** Districts are considered to be in compliance if they complete reevaluations “periodically” or at least every three years (as they do with IDEA students). 104.35(d), Revised Q&A, Questions 30-31. As a practical matter, and to ensure some continuity in the child’s program, Districts should consider an annual review of the child to determine whether changes are necessary due to differences in the child’s schedule in the coming year or changes in the child’s abilities and disabilities. Once the information has been gathered by the §504 Committee, it will determine eligibility based on the criteria previously addressed. If the child is found to be eligible, and in need of services, the Committee will create a Section 504 Services Plan that describes the child’s placement.

**Why does the evaluation precede placement?** *Bradley County (TN) Schools*, 43 IDELR 143 (OCR 2004). In a case that reminds us how quickly things can change, a high school senior with high grades and no record of misconduct was involved in a motorcycle accident on July 31, 2003. He injured his spine, broke 11 ribs, and suffered collapsed lungs, a lacerated liver and a broken arm. The student’s doctor provided the school with a medical diagnosis and in the space requesting a date when the student could return to school, the doctor simply inserted a question mark. The doctor indicated that the student could not attend school, but could receive homebound instruction. Due to a variety of post surgery complications, regular homebound did not begin until late September of 2003 and ceased in November 2003. After experiencing difficulty in reading comprehension, the student was provided with a tutor. When he failed to respond to the tutoring, he complained about the tutors, who in turn, complained that he was disrespectful and lacked intelligence. He returned to school on November 3, 2003. Due to continued medication for pain, the student was tired and easily frustrated. The district continued to provide tutoring, flexibility in attendance, work completion and extra time to complete tests.

Despite the extra assistance, the student did not complete the English 12 work from homebound, and failed the first semester of that class. Along with the obvious lingering physical problems, other residual effects were significant. OCR found that he experienced difficulty with comprehension and underwent an apparent change in personality, evidenced by his confrontation of a teacher (disrespect and bad language) in April, resulting in his placement in an alternative school. He refused to attend the alternative school, and failed both English 12 and Algebra I. He did not graduate. The student was never evaluated for Section 504. OCR focused on the lack of §504 in the school’s response to the student’s sudden and growing needs. “Based on the extent and duration of the Student’s injuries, the evidence suggests that the Student was a qualified individual with a disability at least through his return full-time to classes, and perhaps for an additional period of time during the remainder of his senior year.” The District failed to timely evaluate the student.

*A little commentary:* OCR did not overlook the school’s obvious continued efforts to assist the student. On the contrary, OCR recognized the efforts extended on the student’s behalf, but noted that the 504 regulations required something more.

“The District had numerous meetings with the complainant and the Student in efforts to help him complete course requirements for English 12. But the fact remains that these evaluation and placement decisions were not made by a Section 504 review committee in accordance with the evaluation and placement procedures required by OCR’s regulations. The purpose of these requirements is to assure that an informed decision is made as to a student’s eligibility and need for services. As the District did not follow these procedures, there is no way to know if the services that were provided to the Student actually were appropriate.”

*See also, Fallbrook (CA) Union High Sch. Dist.*, 30 IDELR 985 (OCR 1999)(The District did not identify the complainants’ daughter as a student with a disability under Section 504. The District stated, however, that it had responded to the parent’s request by notifying the daughter’s teachers about the need to accommodate her physical condition. It is not clear whether all the parties shared the same understanding about the parameters of the proposed or offered accommodation concerning running.

During the same week that these events occurred, the daughter's condition worsened, she was hospitalized and subsequently the term ended.”).

#### **D. Some detail on medical data as a part of the Section 504 Evaluation**

**1. Does the §504 Committee need a medical diagnosis as part of its evaluation data?** No medical diagnosis is required for §504 eligibility. “Section 504 does not require that a school district conduct a medical assessment of a student who has or is suspected of having ADHD unless the district determines it is necessary in order to determine if the student has a disability.” *Williamson County (TN) School District*, 32 IDELR 261 (OCR 2000). **In fact, the regulations do not require medical evaluations for any disability to qualify under §504.**

**So what's the rule?** The §504 regulations require no medical diagnosis for eligibility. The school may conduct the §504 evaluation without a medical diagnosis if it believes it has other effective methods of determining the existence of a physical or mental impairment. **What are “other effective methods”?** Remember that the §504 Committee is not asked to “diagnose” impairments, but to identify impairments so that the Committee may meet the needs of the child arising from the impairment. Committees accomplish this by a combination of methods such as student observations, behavior checklists, screening instruments, test scores, grade reports, and review of other available data to (1) identify the impairment and (2) screen out nondisability causes for the student's struggles. OCR's 2016 ADHD Resource Guide reaffirms this position.

“Note, there is nothing in Section 504 that requires a medical assessment as a precondition to the school district's *determination* that the student has a disability and requires special education or related aids and services due to his or her disability. (In fact, as mentioned earlier, the *determination* of whether an individual has a disability need not demand extensive analysis.)” *Students with ADHD and Section 504: A Resource Guide*, 68 IDELR 52 (July 2016)(p. 23)(emphasis added).

*A little commentary:* A piece of very old 504 mythology is that the 504 Committee cannot identify an impairment without a doctor's help—that to do so means that the Committee is medically diagnosing the impairment. Note OCR's consistent use of the “determine/determination” to describe the 504 Committee's decision on the impairment. OCR recognizes that the Committee is authorized by federal law to make this decision, even in the absence of a medical diagnosis (if the Committee believes it has appropriate grounds to do so). That committee decision is not a diagnosis. It is an educational determination. On the other hand, should the school desire a medical diagnosis, it must secure one at no cost to parent.

**2. What if the school thinks it needs medical data? Then it should get the medical data.** *Bethlehem (NY) Central School District*, 52 IDELR 169 (OCR 2009). A student allergic to peanuts, dairy, egg, kiwi, and crab wanted to participate in the school's culinary arts program. The student's allergist opined that the student could safely participate as long as he wore gloves while handling the peanuts and did not ingest any of the foods to which he is allergic. **Despite that information, the school was concerned about the student's safety in the class, and staff “concluded that they required additional information about the extent and nature of the student's allergies.”** To that end, they requested that the parents obtain a letter from the allergist with respect to the student's participation in the culinary class. A letter was provided, but did not allay the school's concerns with respect to “airborne allergens, accidental ingestion, food fights, etc.” **The parent signed a release to allow the school to talk with the allergist who was on vacation when the district attempted contact.** “School staff acknowledged that they made no subsequent efforts to obtain the additional information.” The student was denied enrollment in the class. OCR found a violation as the school did not convene a Section 504 Committee to make these determinations and did not identify the student as a student with a disability. Further, the school denied him enrollment because the school believed it did not have adequate medical information to determine if the student could participate

safely. **“District staff members acknowledged that they could have sought additional information from the Student’s allergist prior to excluding the Student from the Course for school year 2008-2009, but they did not do so.”**

*A little commentary:* It’s fairly simple: if the Committee thinks that it needs medical data in order to make an eligibility or placement decision, it has to get the data to make the decision. The school, not the parent, has the duty to evaluate.

**3. Does a dispute over a medical release mean that the school need not complete the §504 evaluation? No.** In response to a parent’s request for §504 services based on the student’s depression and severe allergies, the school provided the parents with a medical release form. The parent argues that the form was never received. The school argues that since it never got a signed release and could not get access to medical records, it had no duty to complete an evaluation. OCR concluded that the delay was a §504 violation. **“Where as part of an evaluation of a student with disabilities, such as clinical depression and severe allergies, a school district determines, based on the facts and circumstances of the individual case, that a medical assessment is necessary, the district must ensure that the student receives this assessment at no cost to the parents.”** The District agreed to corrective action including a §504 evaluation and a determination of whether compensatory services were owed for the delay. *Rose Hill (KS) Public Schools, USD #394*, 46 IDELR 290 (OCR 2006).

*See also, Muscogee County (GA) School District*, 111 LRP 19301 (OCR 2010)(“OCR also learned that the District has a practice of requiring parents to obtain and submit medical documentation before initiating a Section 504 evaluation. Putting the onus on parents to obtain such documentation before evaluating a student is contrary to Section 504’s requirement that District’s provide students with FAPE. In addition to improperly shifting the financial burden to the parents, such a practice could dissuade parents who do not have the time or resources to obtain such documentation from seeking Section 504 services in the first place.”).

**4. If the school can’t get the medical data it needs, what happens to the evaluation?** The evaluation should still proceed to an eligibility determination on the basis of the data available to the Committee. OCR has found no violation where a district refused to base eligibility on the parents’ assurances that a student suffered from multiple chemical sensitivity (MCS). *Montgomery County (MD) Pub. Schools*, 31 IDELR 84 (OCR 1999). The parent provided the district with medical documentation of the condition (we’re not told what was provided), but the district was either skeptical or did not have enough information to make the eligibility determination. The district sought to get its own medical evaluation of the child, but the parent refused, arguing that the district’s evaluation would not be administered by competent personnel. The district completed the evaluation by reviewing the data it had, but never formally identified the student as MCS. **OCR found no §504 violation** for the failure to identify the student as having MCS, since **“the student’s parent refused to authorize the district to secure an independent evaluation** of the student concerning his suspected MCS” and the district “had insufficient evaluative materials to make an informed placement decision as required by Section 504.” While not explicitly stated in the decision, at issue could be the requirement to not base eligibility upon a single source of evaluation data (here, the parent’s assurances). §104.35(c)(1) & Appendix A, p. 430.

**5. Does every piece of data have the same value? No.** The Section 504 Committee determines the weight to be given to outside evaluations including medical diagnoses, and all data that it reviews.

**“Question 26. How should a recipient school district handle an outside independent evaluation? Do all data brought to a multi-disciplinary committee need to be considered and given equal weight?** The results of an outside independent evaluation may be one of many sources to consider. Multi-disciplinary committees must draw from a variety of sources in the evaluation process so that the possibility of error is minimized. All significant factors related to the subject

student's learning process must be considered. These sources and factors include aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior, among others. Information from all sources must be documented and considered by knowledgeable committee members. **The weight of the information is determined by the committee given the student's individual circumstances.**" Revised Q&A (emphasis added).

**Some things doctors say have more weight than others.** *Marshall Joint School District #2 v. C.D.*, 54 IDELR 307, 616 F.3d 632 (7<sup>th</sup> Cir. 2010). A student with Ehlers-Danlos Syndrome, a genetic disorder that causes hypermobility, suffered from "poor upper body strength and poor postural and trunk stability." He had previously required adaptive P.E. due to these physical issues, but now only requires slight modifications for his medical and safety needs. As adaptive P.E. was the only special education required by the student, the school sought to dismiss him from special education since he no longer needed special education. The Administrative Law Judge (ALJ) ruled that the student could not be dismissed, relying in large part on evidence from the student's doctor that "the EDS causes him pain and fatigue and when he experiences that 'it can affect his educational performance.'" The 7<sup>th</sup> Circuit rejected the ALJ's finding with some excellent analysis.

"Dr. Trapane was the main source of evidence cited for the proposition that the EDS adversely affects C.D.'s educational performance. And the sole basis of her information was C.D.'s mother. Dr. Trapane evaluated C.D. for 15 minutes; she did not do any testing or observation of C.D. and his educational performance. **In fact, 'Dr. Trapane admitted that she had no experience or training in special education and never observed C.D. in the classroom. Her only familiarity with the curriculum was with her own children.** Such a cursory and conclusory pronouncement does not constitute substantial evidence to support the ALJ's finding.... The cursory examination aside, Dr. Trapane is not a trained educational professional and had no knowledge of the subtle distinctions that affect classifications under the Act and warrant the designation of a child with a disability." (Emphasis added).

Further, the doctor's pronouncement indicated that the EDS *could* affect performance. Said the court, there was no substantial evidence that it actually *had* such an affect. **For evidence on the student's need for services, the court looked not to the doctor, but to the adaptive P.E. teacher who was "the one who could testify best concerning whether he needed special education to participate in the gym curriculum and meet the goal for children in his grade level."**

*A little commentary:* This case is best known for a couple of snippets of language you're likely to hear a lot at law conferences.

"It was the team's position throughout these proceedings that physicians cannot simply prescribe special education for a student. Rather, that designation lies within the team's discretion, governed by applicable rules and regulations. We agree.... This brings us to a key point in this case: a physician's diagnosis and input on a child's medical condition is important and bears on the team's informed decision on a student's needs.... **But a physician cannot simply prescribe special education;** rather, the Act dictates a full review by an IEP team composed of parents, regular education teachers, special education teachers, and a representative of the local education agency[.]" (emphasis added).

**6. Does the student's doctor decide what the student gets from Section 504 or does the Section 504 Committee make the placement decision?** While medical data can prove very helpful, the doctor does not order or prescribe educational placements. When the doctor makes a diagnosis or provides information to protect the student's health, the doctor is addressing issues within the doctor's knowledge and expertise. The school's obligation is to document and consider all sources of



evaluation data. Absent medical data to the contrary, the school cannot disregard the doctor's opinion, but that does not mean that everything the doctor orders is medical. For example, even in special education it's the IEP Team that places the student on homebound. "It has long been the Department's position that when a child with a disability is classified as needing homebound instruction because of a medical problem, as ordered by a physician, and is home for an extended period of time (generally more than 10 consecutive school days), an individualized education program (IEP) meeting is necessary to change the child's placement and the contents of the child's IEP, **if warranted.**" *Questions and Answers on Providing Services to Children with Disabilities During the H1N1 Outbreak*, 53 IDELR 269 (OSERS 2009)(emphasis added). Even if the doctor opines that homebound is required, the IEP Team has to make the educational placement decision that can differ from the doctor's preferred placement of the child (note the "if warranted" language from OSERS). A couple of cases emphasize the educational vs. medical distinction.

**Why doctors don't make the placement decision....** For example, not knowing the educational options and resources available to the school, the doctor may simply think that homebound is the only possible solution. A case from Texas provides insight into the analysis that goes into educational placement decisions, and why these decisions are made by an IEP team.

"Dr. [ ] is unfamiliar with the criteria for educational placements; educational programs, including special education; or state or federal criteria for determining the need for homebound placement. Dr. [ ] is unfamiliar with the term 'IEP' and does not know the difference between homeschooling and homebound placement. Dr. [ ] has never visited Student's home or school, or talked to anyone from Student's school. Dr. [ ] was unaware that Student's parent had refused to provide Student's school with her consent for the school to speak with Dr. [ ] about his treatment of Student. Dr. [ ] has provided no information to Student's school that could be confused as a medical and/or professional opinion in support of an eligibility determination of OHI, based on allergies or multi-chemical sensitivity.... The standards for homebound placement do not exist in a vacuum, nor is it left up to the generalized opinion of a physician who is unfamiliar with the written State standards." *Plano Indep. Sch. Dist.*, 62 IDELR 159 (SEA TX 2013).

*See also, Brevard County Sch. Bd.*, 109 LRP 56512 (SEA FL 08/12/09)(With respect to a doctor's opinion on the issue of returning a medically fragile student with autism from homebound to a small classroom in his neighborhood school, the hearing officer wrote, "Petitioner's physicians are not experts on education generally or ESE in particular. Given the nature of their pediatric practices, their counsel on Petitioner's physical capacity to attend public school should be taken into consideration, but only in light of their very limited understanding of what the public school was offering in this instance.").

**7. A doctor's report cannot, by itself, constitute a 504 evaluation.** *Cle Elum-Roslyn (WA) School District No. 404*, 41 IDELR 271 (OCR 2004). Rather than conducting its own evaluation, the school relied on an outside neurologist's report obtained by the parents to determine that the student was 504-eligible due to Tourette Syndrome and ADD, and created a 504 plan. The school did not attempt to evaluate areas of educational need nor did it apparently review any data other than the outside report. OCR found a variety of intertwined violations relating to the absence of an evaluation of the student's educational needs.

*A little commentary:* The criticism here is not directed at the school's reliance on the neurological to identify the impairment, but on the school's failure to add to that data from the wealth of information it had in the student's educational needs. OCR was concerned that the impact of the student's disabilities on education were not considered, thus undermining any §504 plan (how do we know what to provide if we don't know how the disability impacts the student's access to, or benefit from, the school's programs or activities?). *See also, Summer County (TN) School District*, 52 IDELR 83 (OCR 2009)(Evaluation found in violation of Section 504 as school looked only at a general doctor's

statement); *Vineland (CA) Elementary School District*, 49 IDELR 20 (OCR 2007). (“A physician’s medical diagnosis may be considered as part of the evaluation process. However, a medical diagnosis of an illness does not automatically qualify a student for services under Section 504.”).

**8. Why not just ask the parents to pay for the medical evaluation?** Because that’s a violation. *Santa Rosa County (FL) School District*, 110 LRP 48657 (OCR 2009). Despite evidence that the student had an impairment affecting his educational performance (teacher emails indicate that this student’s was “the worst case of ADD” they had seen) and a Connor’s rating scale showed the student’s inattention fell in the “very significant” range on all three scales, the school placed the burden on the student’s parents to follow-up with their physician. “OCR still finds that the School’s policy of requiring a parent to arrange and pay for a physician’s evaluation for children with ADD and ADHD is inconsistent with Section 504.” As part of the corrective action steps, the District agreed to revise its procedures “to ensure that any medical evaluation or other assessment deemed necessary by the District for purposes of determining eligibility under Section 504 will be provided at no cost to parents.” *See also, Rose Hill (KS) Public Schools, supra.*

## II. Some lessons on providing accommodations and services under Section 504.

The school employee’s question: “how far does the school have to go to accommodate a student who....” begins many discussions on §504’s duty to provide FAPE. While the question seems reasonable, it points to a misunderstanding of how accommodations are determined. **The duty is not to provide every possible service and accommodation until §504 can do no more.** The duty to accommodate (or more precisely, the particular services/accommodations a student will receive) is a matter of individualized evaluation and decision-making. That is, the nature of the student’s disability and the student’s resulting need (to alleviate the impact of the disability on the student’s ability to access and benefit from the school’s programs and activities) determines what he gets. What the question really means, is do we have to do what the parent is asking? The obvious answer: it depends.

### A. OCR: The §504 FAPE duty is not subject to a reasonable accommodation limitation.

Many educators mistakenly believe that the §504 Plan they create for students in elementary and secondary programs are limited to “reasonable” accommodations. In response to a question on the subject, OCR concludes that reasonableness is not a factor in determining 504 accommodations on elementary and secondary campuses. “The key question in your letter is whether the OCR reads into the Section 504 regulatory requirement for a free appropriate public education (FAPE) a ‘reasonable accommodation’ standard, or other similar limitation. The clear and unequivocal answer to that is no.” *Response to Zirkel*, 20 IDELR 134 (OCR 1993). For K-12 extracurricular activities and nonacademic services (see below), employment situations and postsecondary students, the answer is different. In support of its conclusion, OCR notes that the §504 regulations on employment and postsecondary education include specific references to a reasonable accommodation standard while the elementary and secondary regulations do not. That omission was intentional because of the uniqueness of elementary and secondary education. A critical factor identified by OCR is the voluntary nature of postsecondary study as opposed to the compulsory attendance rules that require students, both disabled and nondisabled, to attend elementary and secondary schools. Note that the federal courts employ a reasonable accommodation analysis despite OCR’s insistence to the contrary. Consequently, the school’s compliance with OCR’s understanding of FAPE will typically provide ample defense in a challenge to a Section 504 plan in federal court.

So, OCR does not consider cost and inconvenience as limits to the §504 FAPE. What, then, are the limits? The answer lies in the evaluation data. **Since the data determines need (and the areas where the disability gives rise to discrimination, and the need for services/accommodations), the data**

also limits the required accommodations to those necessary to meet the determined disability-based need. A few cases are instructive.

## **B. Evaluation data forms the basis of the accommodation decision.**

Section 504 accommodation is designed to level the playing field, not to guarantee a particular result or maximize potential. A few cases illustrate the importance of the data in providing appropriate accommodation.

**The relationship between need for services and the impairment: Evaluation data requires an aide on the bus.** *Manalapan-Englishtown Regional Bd. of Ed.*, 107 LRP 27925 (SEA NJ 2007). The student's doctor reported that an EpiPen had to be administered "expeditiously" following the student's exposure to peanut protein (whether ingested, touched or inhaled), and that should he have to wait for paramedics to be called and arrive to administer the EpiPen, "there is absolutely no way" he would survive. The Administrative Law Judge ordered an aide be placed on the bus, further finding that

"Peanuts are a common food and people, especially children, who have eaten or contacted peanuts do not always wash or otherwise completely remove peanut proteins from themselves and it is almost impossible to make the school environment completely peanut-free. Therefore, it is probable that J.B., Jr., whether on a school bus or in class, will probably have some exposure to peanut proteins in his school day. A school bus driver, driving conscientiously, would not be able also to simultaneously monitor a severely allergic student and, if the student were to begin to experience an allergic reaction, expeditiously administer an EpiPen and, thereby allow the student to avoid the above-described problems. J.B., Jr., is too young to be responsible to monitor himself and to administer his own EpiPen. Therefore, a nurse, aide or other trained adult is required for those purposes."

**Is *this* reading program appropriate for *this* child?** *I.S. v. School Town of Munster*, 64 IDELR 40 (N.D. Ind. 2014). A student with dyslexia was provided with an IEP that included reading services. The school provided a Read 180 program although the choice of program was not named in the IEP. That choice of methodology by the school was inappropriate for the student.

**"[W]hile I.S.'s most significant area of need was in decoding words (sounding them out), the Read 180 program 'did not provide significant remediation' in that area, and left him 'without intensive, systematic phonics instruction for one school year.' Worse yet, the hearing officer found that the Read 180 program was actually damaging to I.S.'s reading skills.** Because of his difficulty sounding out words, I.S. developed a tendency to guess words based on their beginning sounds, which is a very difficult habit to break. However, Read 180 focuses on fluency skills prior to developing accurate decoding skills, which promotes 'faster guessing' and reinforces this detrimental habit. **Accordingly, the hearing officer found that this methodology was 'not appropriate' for I.S., and that because the IEP was implemented through this methodology, it was 'not reasonably designed to confer educational benefit and was not appropriate [to] meet [I.S.'s] unique needs.'** Emphasis added.

**The district court found that FAPE had not been provided. Why? The IEP must be tailored to the individual needs of the child with the goal of providing educational benefit.** Because the IEP

"failed to specify an appropriate methodology or exclude the Read 180 program, which would have produced no benefit, I.S.'s 5th grade IEP was not tailored to his unique needs or likely to produce progress instead of regression.... if, as the hearing officer found, the IEP was indifferent as to which methodology was used, it cannot have been reasonably calculated to provide educational benefit when one of the potential methodologies would have been likely to produce regression or no progress."

*A little commentary:* Schools seeking to hide from denials of FAPE by arguing that they choose methodology should reconsider the approach. The school must provide FAPE, if its choice of methodology gets in the way of FAPE, the school has only itself to blame.

**Data lessons from a demand for a “No Spray” Policy.** *Zandi v. Fort Wayne Community Schools*, 112 LRP 48082 (N.D. IN. 2012). While a junior in high school, Josh began experiencing allergic reactions to “certain perfumes, fragrances, and lotions.” His reactions ranged from mild rashes to facial swelling, tightness in the chest, and anaphylactic shock. An allergic reaction at school resulted in a five-day hospitalization. Josh finished his senior year in home-based education to avoid additional serious reactions. The litigation involves the school’s refusal to implement a parent-requested “No Spray” policy. The policy would have prohibited, in writing, the spraying of fragrances in the building. While the school refused to adopt a written policy, it did take action to address the problem. The school, through emails to staff and morning announcements, encouraged students and staff to avoid the spraying of perfumes, and a school newspaper article was written to raise awareness of the student’s predicament. Teachers and staff were on the look-out for individuals spraying perfumes, but none were ever found. The school also offered to allow the student access to the building through another entrance to avoid the crush of students (and exposure to scents), a different arrival time at school, the ability to stagger his passing periods to avoid the throng of students and suggested Josh consider the use of a mask.

Summary judgment was granted to the school on Josh’s discrimination claim as the school provided reasonable accommodations (remember, this is a district court case, not an OCR letter) and there was no evidence that a written policy would have made any difference.

“Although Josh suffered multiple reactions of varying degrees of severity, there is no evidence that anyone sprayed perfume inside the school. In fact, in some cases, Josh did not even smell perfume before a reaction. Without a medical or other expert opinion establishing that perfume sprayed in the building elicited a different reaction than perfume already sprayed on a person who enters the building, Josh cannot show that even an effective policy would have prevented his reactions from occurring.”

Finally, the student does not remember seeing anyone spraying fragrances prior to any of his allergic reactions, and review of surveillance tapes by school personnel likewise do not evidence anyone at school spraying perfumes.

**The American Diabetes Association Model Section 504 Plan.** The American Diabetes Association provides a great deal of useful information and guidance to parents and schools about the impairment itself and things that the school can do to assist students with diabetes access and benefit from public education. In those efforts, the Association provides a model §504 plan. On the top of the plan, the Association clearly and carefully indicates that the plan lists a broad range of things that might be needed. Unfortunately, some parents miss this crucial language on the Model Section 504 Plan:

“NOTE: This model 504 Plan lists a broad range of services and accommodations that might be needed by a child with diabetes in school. The plan should be individualized to meet the needs, abilities, and medical condition of each student and should *include only those items in the model that are relevant to that student*. Some students will need additional services and accommodations that have not been included in this model plan.” (emphasis in the original). [<http://main.diabetes.org/dorg/PDFs/Advocacy/Discrimination/504-plan.pdf>]

The §504 Committee should be aware of this language and remind parents, where appropriate, that not all of the sample plan’s provisions are necessary for each student, and that excessive accommodation can deny the student the opportunity to acquire new skills or deny access to necessary instruction. Says

the Association “No two Section 504 Plans will be the same, because different students need different things. For example, there is probably no need for a section on self-management for a kindergartener. And a provision allowing the student to test his or her blood glucose before a test may be particularly important for a high school senior.” <http://www.diabetes.org/living-with-diabetes/parents-and-kids/diabetes-care-at-school/written-care-plans/section-504-plan.html> Finally, note that the Association recognizes that schools may want to use their own compliance systems. “Some school districts prefer to use their own 504 Plan form. This is perfectly fine as long as it contains language to appropriately meet all of the student’s diabetes care needs at school. The content is what matters.” *Id.*

**Parent preference and services.** *Lincoln Elementary School District 156*, 47 IDELR 57 (SEA IL. 2006). “It is clear that it is inconvenient for the parent to bring the student to school. However, no testimony indicated that he had a medical or other disability which would require transportation.” The student lives within 6 blocks of the school, thus not qualifying for regular transportation available pursuant to school policy for students outside a 1.5 mile radius from the school. His IEP team at the March 21, 2006 meeting determined that transportation would not be needed as a related service. The parent did not bring any testimony indicating otherwise. While the student “has a nebulizer at school for asthma, however, he only used it at the request of the parent during a short period. He was never observed having difficulty breathing, even after strenuous activity.” No transportation was required as a related service.

**Student preference and services: is access to a microwave required for a student with diabetes?**

Nope. “The request to heat up J.M.’s homemade food represents the archetype of a preferential, as opposed to a necessary, accommodation. After his diagnosis, J.M.’s parent made the reasoned decision, in collaboration with J.M.’s hospital nutritionist, to send homemade lunches to school at least until he became more acclimated to his condition in order to more strictly monitor his diet. Although J.M.’s lunches were homemade, there is no evidence to suggest that he was excluded in any way from eating his homemade lunch with other non-disabled peers during the lunch period. Diabetics do not require hot food and no such claim is made here.” *A.M. v. N.Y.C. Department of Education*, 112 LRP 3144 (E.D. NY 2012). The Court of Appeals affirmed, *Moody vs. N.Y.C. Department of Education*, 60 IDELR 211 (2<sup>nd</sup> Cir. 2013), *cert. den’d*, 113 LRP 49698 (U.S. 2013). Wrote the Second Circuit: “**It is undisputed that diabetics do not need to eat hot food in order to manage their diabetes successfully. Therefore, even if J.M. sometimes skipped lunch and disliked the food on the school menu, that did not warrant a further accommodation in addition to what the school had already provided.** The accommodations the school had provided—lunch menu options and monitoring of J.M.’s blood glucose level—afforded J.M. meaningful access to the benefit to which he was entitled: public school lunches.” (Emphasis added).

*A little commentary:* Please note, in the context of ADA Effective Communication for students with vision, hearing and speech disorders, the school must give primary consideration to the parent’s preference, but can provide a different device or service if the school can prove that its offer is equally effective as the parent preference. 28 C.F.R. §35.160 *et. seq.*

**An important distinction: “Parentally-desired” vs. “Doctor-required.”** *Murfreesboro (TN) City Sch. Dist.*, 34 IDELR 299 (OCR 2000). The parent removed a student with asthma from the school and threatened not to return the student until a nurse was present on campus. The district refused to provide a nurse, but contacted the doctor to understand the student’s medical needs. Specifically, the school wrote a letter to the doctor asking if a nurse was required to be present at school. The doctor responded by letter that “he was not aware of any acute medical indication for keeping the Student home from school, and that it is reasonable to provide *nonmedical* personnel with appropriate training in the administration of her medications.”

*A little commentary:* Evaluation data is the key to resolving these types of issues. A parent demand for an accommodation does not create a school duty to provide the accommodation under §504. The

legal duty arises from the impairment, and the data (here, input from the doctor) helped the school to determine what the disability required as opposed to what the parent wanted (which was clearly much more than what the disability actually required).

**Solving a problem without understanding it.** *Salem-Keizer School District*, 26 IDELR 508 (SEA Ore. 1997). Does the child who must be shielded from a wide variety of allergens at school (according to the doctor's letter) live a life at home that seems unconcerned with exposure? That is, what does the child do when he/she is not in school? Does he/she go to the mall, play outside or at neighbors' houses, go to church? Does the child play at the park, go to the zoo? If the child's home life is very different in terms of reaction to allergens, another issue may be present. A hearing officer's decision from Oregon is instructive. A.E. was a female student with, according to the parents, severe chemical sensitivities and allergies. Throughout the school's relationship with the student, the parents and student's physician were vague in identifying "what if anything within the school buildings was adversely affecting A.E." In (over)response to the vague concerns, the school made considerable changes to the school building, installed fans, air filters, changed the types of chemicals, paints and cleaning supplies it used and the schedule under which it used them, and even built a "clean room" where A.E. could go to recover from exposure to whatever it was that bothered her. The school became suspicious when it noted the variety of activities A.E. was involved in outside of school, with no resulting physical reaction. "Apparently, she was not able to go just anywhere, but she was very capable of being around other people in settings which were seemingly much more polluted than various parts of the school buildings." The hearing officer summarized the suspicions.

"A.E. sometimes has symptoms, such as flushing, hives, headaches, fatigue and other allergic type reactions. She experiences or complains of these symptoms in some settings, and around some people some times, but not other times. She cannot cope with some physical surroundings such as the 'clean room' at SSHS but can be around friends and other students in social settings where smoking and fragrances are relatively uncontrolled. She has problems in some social settings but not others. She cannot go to some stores, but has little discomfort in others. She complains of being bothered in some new construction areas, but not others.... **The impact that substances have on her varies to the extent that sometimes she will put up with them if it means she can do what she wants to do while on other occasions she wants to do something, but simply cannot.** She is a very strong willed young woman, and pretty much determines her limitations and what she will and will not accept." (Emphasis Added)

The hearing officer agreed that the inconsistencies were evidence that the disability was not what the parents would have the school believe. **Further problematic was her rejection of tutors sent by the school to her home during periods when she did not attend school. The Hearing Officer believed that A.E. simply did not want to be subjected to the structure of school.** "Keeping in mind that this is a very intelligent young woman, she also is very assertive, and, she sometimes informed her tutors that they did not pass the 'sniff test' and therefore they could not come into her home, that she did not want to take tests or respond to questions or be required to do certain assignments, or take certain subjects in the prescribed order, or for that matter take some classes which are required for graduation of all."

*A little commentary:* In essence, A.E., with the help of her mother who also suffered from multiple chemical sensitivity, used an amorphous, confusing set of allergies or sensitivities as a school avoidance technique. Unfortunately, the school's response was to throw money at a problem, including the cost of building a clean room, without ever knowing exactly what triggered her allergies. The hearing officer suggests that counseling would have been far more effective than air filters. The author is not suggesting that all students with allergies are simply avoiding school. Rather, schools should be careful to base their decisions on data, and as cost and inconvenience of the requested services and accommodations increase, the complexity of the data demonstrating the necessity of these services and accommodations should increase as well.

**When demands, not data, control the plan.** *Smith v. Tangipahoa Parish School Board*, 46 IDELR 282 (E.D. LA 2006). The student (C.R.S.) was diagnosed with allergies after coming into contact with a horse. She had an allergic reaction and was taken to the emergency room. Upon enrollment in a new school in what appears to be “horse country”, the parents informed the school of the student’s horse dander allergy and requested that the student have an EpiPen available in the nurse’s office and a designated seat on the school bus to avoid exposure to students who may have been in contact with horses. The school provided both of these accommodations for the 2003-2004 and 2004-2005 school years. “Apparently in response to two incidents—one in which a library display used horse tack and the other occurring during Kid’s Week when a horse was brought onto campus—Plaintiffs engaged an educational advocate in February of 2005 in order to represent them in getting accommodations for C.R.S. Plaintiffs formally requested accommodations under Section 504.” The completed Section 504 Plan included the following accommodations:

- “Sending a notice to all parents indicating that “one or more students at Loranger Elementary School had a life-threatening allergy to horses” and **requesting that parents avoid bringing horses on campus, refrain from using horses or horse equipment as transportation to and from school, and ensure that their child’s clothes and hands were clean and free from horse dander;**
- Holding a faculty meeting addressing Disability Harassment relating to FERPA, Awareness, Legal and Educational Responsibilities, Laws that Apply to Disability Harassment, and Retaliation;
- **Prohibiting horses and horse tack from being brought on campus;**
- Training teachers and bus drivers to administer an EpiPen;
- Placing an EpiPen in the classroom, on the school bus, and in the office with the key accompanying C.R.S.;
- Initiating a walkie talkie protocol in which a walkie-talkie accompanied C.R.S. around campus;
- Giving the bus driver a cell phone programmed with relevant numbers so that she could summon medical help and alert her parents of an allergic reaction; and
- **Washing down the public road if a horse passed down it so as to minimize the chance of C.R.S. having an allergic reaction.” (Emphasis added)**

Following creation of the Plan, the only apparent horse dander exposure occurred in late August of 2006, when the student “had an allergic reaction consisting of ‘watering eyes’ and a ‘scratchy throat’ while at school.” According to the parents, [the student] was seated next to a child that had allegedly been in recent contact with a horse. She was moved and her parents were informed of the situation.” Interestingly, there was no discussion of the scope or duration of the student’s reaction to the exposures giving rise to the 2005 Section 504 Plan which seems to indicate that while there was exposure, there was not sufficient exposure to cause a reaction.

**The community was not entirely receptive to the restrictions imposed via the student’s 504 Plan...** For example, the principal found the campus-wide ban on horses difficult and a bit scary to enforce. **The principal “called a deputy in to help and personally stood in the roadway to attempt to stop the horses from proceeding, but that [t]he parents refused to stop and proceeded down the road, and the deputy had to pull [the principal] out of the way.”** Further, in response to the campus administration’s decision to cancel their reward to the students for good attendance during test week (both the principal and assistant principal promised to ride their horses to school), a campus parent passed out flyers urging them to reconsider. “In the flyer, she urged all parents to contact Browning and members of the school board and voice their support for Browning and the vice principal’s decision to ride horses to school on March 24. Although the flyer did not identify Plaintiffs or any of their children by name, the flyer stated that there was a child allergic to horse hair who threatened cancellation of the event and noted that ‘[t]his same parent caused our

students to miss out on a beautifully decorated Library during Book Fair about 2 years ago, when the theme was western, and saddles, etc. had to be removed for ONE child.” **That flyer, together with vandalism of the student’s home, and group of citizens in a car yelling “horse hater” to the child’s parent were characterized as retaliation by the school, giving rise to the lawsuit.**

Most of these accommodations were provided by the District until after the lawsuit was filed. That changed, however, when the school learned about the actual medical necessity (or not) of some of the accommodations. **“During the deposition, Dr. Schneider indicated that while C.R.S. had allergies which had the potential to be quite severe, her allergies did not require many of the accommodations Plaintiffs had requested and received as part of the 504 accommodation plan for C.R.S.** Specifically, Dr. Schneider stated that it was unnecessary and ‘impractical’ to ban horses on campus, wash down the road after a horse passed upon it, and have administrators carry a cell phone or walkie-talkie for C.R.S. alone. In light of Dr. Schneider’s statements and upon the advice of counsel, Defendants stopped washing the street down after a horse passed upon it, ended the walkie-talkie protocol, did not require the bus driver to carry a cell phone for emergencies involving C.R.S., did not send another notice to parents instructing them not to bring horses on campus, and put the EpiPen in the nurse’s office.”

Which accommodations were medically necessary? Dr. Schneider, and subsequently, Dr. Kid opined that only the following were necessary: “informing persons directly responsible for or likely to come into contact with C.R.S. of her condition and the possibility of her having a life-threatening reaction and making sure that C.R.S. takes certain medications on a daily basis, carries around or has ready access to an EpiPen, and avoids contact with potential allergens ‘as well as possible.’”<sup>13</sup> As previously mentioned, it is undisputed that the school complies with all of these recommendations.” The court’s reference in footnote 13 is interesting. **“The efficacy and reasonableness of these accommodations is further evidenced by the fact C.R.S. went years without having a reaction at school with only these accommodations in place.”** (Emphasis added).

Ultimately, the court found that the school was not responsible for the community’s negative reactions, and interestingly, that the student was not in fact eligible under Section 504.

*A little commentary:* Under the pre-ADAAA eligibility standard, the court found that the student was not Section 504 eligible, as she was not substantially limited in either breathing or learning.

“While C.R.S. could potentially have a very severe reaction under some circumstances, no such reaction has actually occurred over the course of her life. The record indicates that she had a strong reaction in 2001, another milder one following her first allergy shot, and a third in August of 2006. Moreover, no evidence indicates that these reactions substantially limited her ability to breathe when they occurred. Her most recent reaction involved only ‘watering eyes’ and a ‘scratchy throat,’ and the ‘mild anaphylactic reaction’ she experienced after the administration of her first allergy shot in 2003 was apparently only ‘an itchy, welty rash.’ Even before she began receiving allergy shots from Dr. Schneider, the record is basically void of references to C.R.S.’s allergies adversely affecting her ability to breathe. **Such infrequent and relatively mild occurrences do not amount to ‘substantial’ limitations, and while C.R.S. has the ‘potential’ to have a more serious reaction, a potential reaction does not ‘presently’ limit her ability to breathe.**” (Emphasis added).

While the 2008 passage of the ADAAA expanded eligibility, the limited effect of exposure to horse dander on the student’s breathing would still raise questions as to whether she is substantially limited under current law. Of course, that analysis would now include the requirement to remove from consideration the ameliorative effects of mitigating measures like the Epi-pen and other accommodations provided to the student. **Finally, the author wonders what community reaction would have been were the accommodations limited to only those medically required.** The case is a reminder that as demands for accommodation become increasingly expensive, inconvenient or unusual,



the school should pursue increasingly expensive and more expert data demonstrating necessity of the requests. **The court's comment at footnote 13 is a good reminder that when the problem is addressed appropriately (the playing field is leveled), no additional solutions are required.**

### **C. Does the proposed solution make educational sense?**

**Is unlimited water fountain access the only solution?** *North Lawrence (IN) Community Schools*, 38 IDELR 194 (OCR 2002). A common problem encountered by schools is a disability related need, and a parent's strong preference for a particular accommodation to address the need. In this case, the student was diabetic, and the parent was concerned that his needs for water were being disregarded during the school day as he had been denied access to the water fountain on a variety of occasions. The district was apparently concerned that too frequent water breaks were interrupting the educational process and interfering with the student's ability to stay on task. To provide proper hydration while maintaining the student's presence in the classroom, the district suggested allowing the student to keep a water bottle at his desk. After an initial objection for unspecified "hygiene" reasons and logistical concerns about refilling it, the parent agreed to the accommodation, and OCR determined the matter closed.

**Concerns over lost instructional time.** Parents of a student with diabetes and a peanut allergy were concerned about the amount of time the Student was out of class when she was being tested in the nurse's office. The Student was required to leave class as many as four times each day, resulting in up to an hour per day spent out of class. **The parents were not persuaded by the "teacher's assurance that she did not teach when the Student was out of class."** To address the issue, the school will test in class twice a day, and in the nurse's office twice a day when the student's schedule brings her close to the office. *Shelby County (TN) School District*, 108 LRP 88122 (OCR 2008).

**Adjustments to attendance policies.** Without question, physical and mental impairments can impact a student's ability to attend school. In fact, the impact of these impairments on school attendance may give rise to child find duties, and require §504 eligibility. For example, a junior high school student with severe allergies, asthma, and migraine headaches had a lengthy history of missing school due to her medical problems. In seventh grade, she was absent 132 times, and in eighth grade attended classes only three to ten times from September to November. The parents argue that the school failed to accommodate the student's absences. The only evaluations conducted by the district with respect to the child's absences were very recent attempts to find psychological causes, even though the district had been aware of the student's other medical problems for the past five years. OCR found that the district failed to properly evaluate given the information that it had on the medical-related absences. *Grafton (ND) Public School*, 20 IDELR 82 (OCR 1993).

As a general rule, Committees should look first to the impact (success or failure) of the school's regular attendance and make-up work policies to determine if they are effective in meeting the student's needs. If so, no additional accommodation would seem necessary. Where, however, there are significant absences and the student is unable to catch-up within an appropriate amount of time upon her return, the Committee ought to consider the provision of services while the student is at home, additional time to complete missed work, access to instructional staff for direct instruction on material missed during the absences, and other appropriate efforts to ensure that the student's needs are met as adequately as those of nondisabled peers.

**Is it possible to accommodate-away sources of evaluation data?** Yes, that can happen if the committee is not careful. Parents of a 14-year old student with Type 1 diabetes alleged that the school discriminated against their son by refusing to grant him automatic excused absences for his medical needs. Instead, the §504 plan stated that the Student would not be penalized for absences due to medical appointments or treatment. The parents sought the absence language in apparent reliance on draft 504 plan language from a national diabetes organization (see commentary above). The school

rejected the automatic excused absence language, and instead, provided that, as was the case for all students, all absences would be evaluated and recorded as excused or unexcused in accordance with state law and local board policy. That meant that for purposes of absences for medical appointments, the student must provide a doctor's note. OCR found no discrimination or violation. *Fayette County (GA) School District*, 44 IDELR 221 (OCR– Atlanta 2005).

**What if the parent won't provide documentation of the absences?** *Melrose (MA) Public Schools*, 44 IDELR 223 (OCR 2005). Consider the case of a parent keeping the student at home claiming a medical rationale for the absences, but refusing to provide the documentation required by campus policy. When campus efforts to get doctor's notes to verify the nature of the absences were continually frustrated, and the student was a close to missing the required number of days for truancy action, the campus contacted the student's doctor. The doctor assured the school that there was no medical reason for the student to be absent so extensively. The school filed for truancy and the parent filed with OCR alleging retaliation. OCR rejected the parent's complaint.

**Shortened school day.** The Section 504 plan for a student with chronic severe migraine headaches provided for an adjustment to the academic schedule in the form of half-day attendance until the headaches abated and the student could return full time. *Hudson (NH) School District*, 58 IDELR 22 (OCR 2011); *See also, Scottsdale Unified School District*, 38 IDELR 137 (SEA AZ. 2002)(Student received accommodations under §504 for ADHD and bipolar disorder including elimination of first hour class, presumably because of the impact of the student's medication on his ability to perform during the first hour class). These are not common accommodations. Note further that shortened day, even where required by the student's disability, simply shifts the timing of instruction and mastery of the grade level curriculum to a time when the student's health/condition allows for instruction. The student still must master the state's grade level curriculum. Section 504 is not a statute of reduced expectations.

**Homebound isn't appropriate when the student isn't confined to the home.** Allegations of home confinement must be viewed in the context of other activities engaged in by the student both during and outside of school hours. *See for example, Calallen ISD v. John McC.*, Docket No. 132-SE-1196, p.7-8 (SEA Tex. 1997) ("Some students need continuous homebound services. John is not among them. One is hard pressed to justify continuous homebound services for a student who drives the family car, goes out on dates, and regularly participates in other activities outside the home."); *Plano ISD*, 62 IDELR 159 (SEA TX. 2013) ("Outside of school Student is not restricted to home. Student goes to the local shopping mall with friends, McDonalds, and other social gatherings. Student enjoys swimming and playing soccer.... Student appears robust and healthy and seems to engage in activities involving mold, pollen, and other people when the activity suits student."); *Bellingham Public Schools*, 41 IDELR 74 (SEA MASS. 2004) ("Student testified that he regularly leaves his home, particularly after the end of the school day. He described various things that he typically enjoys doing outside of his home within the community—for example, 'hanging out' with his many friends, watching football games, seeing his girlfriend, driving a car (he has his learner's permit)... Parents would not consent to home tutoring being scheduled after school hours, because the tutoring would then interfere with Student's spending time with his friends. The inescapable conclusion is that Student is not, for any reason, confined to his home.").

*A little commentary:* A common problem arising in these situations is a doctor's note that indicates the student is confined to home, but evidence indicating that the student appears to function without any such restriction. In these situations, while the Section 504 Committee or IEP Team can certainly conclude that homebound is inappropriate, it is nevertheless faced with the problem of a student who may not want to return to school, a parent unable or unwilling to make him, and a doctor supporting nonattendance. As the school must provide FAPE somewhere to the eligible student, the school faces some difficult choices, including (1) IEP Team/504 Committee action returning the student to school. This action could result in a due process filing and a hearing officer weighing the doctor's opinion on

confinement against the evidence of the student's outside activities OR the student's refusal to attend and mounting absences, which under state law, may require truancy filings and a truancy judge ultimately weighing the issues; or (2) Provide services in homebound despite the IEP Team's/504 Committee's belief that the home is not the LRE. For a student uninterested in school, service providers may find the student unavailable, uncooperative or unconcerned about instruction. These situations can require a great deal of attention and resources to resolve. Schools should approach these thorny situations with the help of the school attorney.

**Determine a student's Texas GEH Homebound through a 504 evaluation?** OCR's decision in an Oregon case points to an LRE or discrimination problem if you don't. Lacking appropriate staff and a health plan to address the medical needs of a student with diabetes, the school placed the student on homebound instruction. OCR determined that this was a significant change of placement for a student because of a physical impairment, requiring a Section 504 evaluation first. In essence, the school knew of the impairment and the resulting need for services. Thus, the school had a duty to conduct a Section 504 evaluation before it could place the student in homebound. "Further, because LPSC placed the student in an in-home tutoring environment, which was a more restrictive environment than what the student had previously and subsequently been provided, LPSC failed to comply with [the Section 504 LRE requirement at] 34 C.F.R. §104.34(a)." *Lourdes (OR) Public Charter School*, 57 IDELR 53 (OCR 2011).

#### **D. Lessons on technology and the 504 Plan**

In its 2015 Budget Request, OCR highlighted areas where it will be acting in concert with the ED Strategic Action Plan on issues of concern. For students with disabilities, OCR is targeting (1) "ensuring that schools properly evaluate students with food allergies and other health impairments"; (2) **"determining technology needs"**; (3) "giving students with disabilities equitable access to athletic programs and activities;" and (4) "reduction of discriminatory bullying, harassment and violence." 2015 Budget, pp. BB-20-BB-23). Technology concerns will be a priority. A few cases provide some lessons on making technology decisions.

**Technology is almost always helpful, but that's not the test.** *High v. Exeter Township Sch. Dist.*, 54 IDELR 17 (E.D. PA. 2010). Wrote the court: "although assistive technology will almost always be beneficial, a school is only required to provide it if the technology is necessary. Moreover, the failure to provide assistive technology denies a student FAPE only if the student could not obtain a meaningful educational benefit without such technology." For the Section 504 student, the question would be whether technology is required so that the educational needs of the 504 student can be met as adequately as the educational needs of his nondisabled peers.

**Where needs are already met, no additional services (or technology) are required.** *Grant v. St. James Parish Sch. Bd.*, 33 IDELR 212 (E.D.LA. 2000). Here, the student was §504 & dyslexic under Louisiana's dyslexia law. The student's performance was on or above average academically even before accommodations and services (extended time, repeated directions read aloud on tests, no penalty for misspellings, and 1 hour weekly in Project READ). She consistently passed the statewide assessment. The parents requested a special education evaluation, with an assistive technology device assessment, and 1-2 hours per day small group tutoring. The court rejected the request because the student was already making progress despite mild-moderate dyslexia. In short, if benefit is already received, how are *more* services necessary?

**Does he use it at school?** *Jefferson County School Dist. R-1*, 39 IDELR 119 (SEA CO. 2001). The Parent complained when the school refused to provide an at-home computer for homework for a student with dysgraphia. While the student had access to computers at school, he did not use it. Nevertheless, staff provided time at school to complete homework. Said the Hearing Officer: "It appears the teacher

members of the IEP team believe this student to have the capability of writing in his own hand. It will require physical training and student working through his emotional frustrations while learning to do so. If this is so then student will not need a home computer.... Further, he has failed to demonstrate that he will effectively use those computers which are available to him at school. The home computer requested is at this point a 'want' and not a 'need'."

**When accommodation goes too far... You can use a calculator, just not THAT calculator.** *Sherman v. Mamaroneck Union Free School District*, 340 F.3d 87 (2<sup>nd</sup> Cir. 2003). A student with a learning disability in math was allowed through his IEP to use a scientific/graphing calculator in class. The plan did not designate a particular model of calculator, but provided that the student's teachers would determine the appropriate device. In the past, he had utilized a TI-82 that required the student to work through various steps before getting to an answer. The student's parent insisted that he be allowed to use a TI-92 that would provide the final answer but not require the student to work through the various steps (the factoring) necessary to get there. The student's teachers were convinced that he could learn to factor, and that use of the TI-92 would be inappropriate because it would circumvent the learning process by doing too much of the work for him. According to his teachers, factoring is a significant component of the Math 3A curriculum. "It is educationally beneficial for Grant to acquire new skills, well within his capability. It would, therefore, be inappropriate for him to retake tests using the TI-92 to factor." The TI-92 is inappropriate because "it would allow Grant to answer questions without demonstrating any understanding of the underlying mathematical concepts." The court concluded that the student's failing grades in math did not mean that the assistive technology provided was inappropriate. Instead, the failing grades were the result of the student's lack of effort. "The IDEA does not require school districts to pass a student claiming a disability when the student is able, with less than the assistive aides requested, to succeed but nonetheless fails. **If a school district simply provided that assistive device requested, even if unneeded, and awarded passing grades, it would in fact deny the appropriate educational benefits the IDEA requires.**" The student did not need the advanced calculator. In fact, a more advanced calculator was inappropriate on these facts.

**Technology is no replacement for direct instruction.** *City of Chicago School District 299*, 62 IDELR 220 (SEA IL 2013). The student is IDEA-eligible, diagnosed with autism, multiple learning disabilities, and speech and language impairments. As a result, the student struggles in comprehension of basic math. For example, the student can only count up to the number five, cannot complete most addition and subtraction calculations above a basic level, has problems with visual and spatial reasoning, and is unable to complete basic math facts. Further, his IEP reflects that his level of performance in basic math skills have not changed significantly since 2010. In its post-hearing brief, the District took the position that "Student will never be able to understand abstract mathematical concepts so that Student could understand the meaning behind basic math."

The Hearing Officer was unconvinced, believing that the student's lack of progress was not due to lack of capability but poor choices in terms of teaching strategies and inappropriate accommodations. For example, during a summer of compensatory services provided by a special education teacher (required due to a settlement agreement with the parent arising from an earlier dispute), the student made progress in math.

"District Summer Teacher testified that by using some of the techniques in multi-sensory instruction, Student was able to make progress on basic math. Moreover, Student's IEPs suggest that 'hands on learning' is a way in which Student can learn. Hands on learning is a key component of multi-sensory researched based instruction. Therefore, the undersigned makes an inference that Student can learn basic math concepts when provided with an appropriate methodology which meets Student's unique needs."

These successes convinced the hearing officer that the student could make better progress on math goals, given appropriate services and in the absence of some inappropriate accommodation. The

student's current math teacher testified that the **"Student is currently not being taught basic math skills. Rather, Student is being provided the accommodations to make up for Student's failure to understand basic math in an attempt to teach advance math skills."** Translated: the student is using a calculator to handle basic math skills but does not understand the basic functions handled by the calculator.

**Scaling the technology: But I want an iPad, not a Springboard.** *Los Angeles Unified School District*, 111 LRP 75098 (SEA CA 2011). The student at issue is IDEA-eligible due to ataxic Cerebral Palsy, mild/moderate intellectual disability, asthma, seizures and developmental delays. The student is nonverbal. He communicates with vocalizations, expressions, some ASL, gestures and a School-provided communications device, a "Springboard." The Springboard was chosen after evaluating the student's communication needs, and the determination that a dynamic display system with voice output would meet student's unique needs. The District's Augmentative & Alternative Communication (AAC) Assessor not only approved the device, but also programmed the screens, and trained the student, teacher, and aide to use it. He was available for maintenance as well. When a new version of the device became available, "he met with Student and Mother to work on the setups that would be required for the fall semester and for home. He trained the AT provider, the SE teacher, and the AA, who was primarily responsible for cuing and redirecting Student, and for encouraging him to use his Springboard voice output device." The student's technology needs are limited to his communication difficulties.

The Parent demanded an iPad2 instead, arguing that "the iPad 2 would be better suited to meet his [communication technology] needs." Said the Hearing Officer

**"[A] school district is not obligated to provide the most technologically advanced AT device, or a device that would serve other purposes.** Instead, a district is required to assess and determine a student's unique AAC needs and then to provide the AAC which addresses the need. The District established that it properly assessed Student and that the SpringBoard and the SpringBoard Lite were AAC devices especially well suited to serve Student's augmentative communication needs." (Emphasis added).

## **E. Student Effort**

**Can a student receive a failing grade and be receiving FAPE? Yes.** A problem sometimes encountered by special educators is concern over a child who even with appropriate services has failing grades. Is such a thing possible? Yes.

**Student fails because he didn't turn in work and didn't try.** The parent complained to OCR that the student's IEP had not been implemented causing the student to fail in keyboarding and Spanish. The student was learning disabled. Classroom accommodations included extra time for written work, the chance to redo work deemed unacceptable by the teacher, and verbal clarification of instructions and assignments. The student failed keyboarding when he failed to complete, print, or turn in work. In the Spanish class (where no accommodations were required) the student nose-dived after the third 9-week session when he failed to make up three tests, a vocabulary poster and a major composition. **The student left his final exam blank.** When given the opportunity to redo papers or make corrections on assignments for a new grade (something the teacher did for all students), the student chose not to participate. OCR found no violation. "Student B's failure to pass keyboarding and Spanish was not related to the District not implementing his IEP. The District tired [sic] to implement his IEP, however, the student would not attend make up or tutoring sessions and did not retake exams when the opportunity was available." *Beaufort County (SC) School Dist.*, 29 IDELR 75 (OCR 1998).

**You can lead a horse to water...** The parent of a 15-year-old special education eligible student with a speech-language impairment alleged that the IEP was inappropriate because the student's grades

were poor. The parent argued that the student should receive individual tutoring in science and math. The Hearing Officer rejected the claim, finding that the student was extremely capable, but loathe to avail herself of existing opportunities to receive tutoring and re-take tests. Both parent and student were aware of existing opportunities for tutoring and retaking tests as a regular education service. According to the Hearing Officer, the low grades in geometry arose from the student's lack of background in Algebra I. The parent had insisted that the student take geometry in 9<sup>th</sup> grade without taking Algebra I first. In science, the poor grades were the result of the student's not turning in work. Interestingly, both science and math provided regular tutoring opportunities. The student attended science tutoring approximately five times during the school year, and geometry tutoring once or twice. "Tutoring did not substantially aid Student in science and math because she did not take significant advantage of the tutoring opportunities she knew she had." Similarly, the Hearing Officer found that "at all relevant times, the District offered Student the opportunity to retake any test on which she received a D or an F, but Student rarely chose to do so." If she had low grades on tests, said the Hearing Officer, it was because she either didn't re-take or she had low scores on the re-take. The student's IEP was appropriate. *Sequoia Union High School District*, 47 IDELR 209 (SEA CA. 2007).

*A little commentary:* The Hearing Officer's decision is nicely based on the philosophy of intervention. Why provide something through special education when there is no evidence that the special education version of tutoring or test re-takes will be any more effective for a student who has no interest in tutoring or re-taking tests as a general education opportunity available to all students? Additionally, there was no evidence presented that tutoring or test re-takes were required for the student to benefit. The hearing result is also influenced by the student's interesting disruptive behaviors (she frequently sketched or read comic books in class, disrupted instruction and "used profanity at inappropriate moments.") The school requested consent to interview the student as part of its efforts to create a behavior management plan (as was its practice with all students) but the parent refused to allow the student to participate. The parent likewise refused consent to conduct a functional behavioral assessment, and refused a mental health assessment of the student.

**An important factor in these two cases is the districts' good faith and clean hands.** In these cases, there was no question that school officials were concerned for the child and his performance. There was also a level of extra attention and effort in each case, and procedural compliance. Since OCR will typically not second-guess educational decisions made following the proper procedures, and the good faith of the school officials deflected any other concerns, the districts were found in compliance. **On the other hand, where the failure arises from the absence of appropriate services for which the student is qualified, the results are markedly different.** In a Texas case, a disabled student's microcomputer teacher accepted late assignments, gave the student special instructions and extended deadlines, but the teacher did not use all of the accommodations required in the accommodation plan. The student received a final grade of 68. OCR found a violation and the district agreed to resolve the allegation. *Arlington (TX) ISD*, 31 IDELR 87 (OCR 1999). It would have been nice to see what accommodations the teacher failed to implement, and to know specifically why the child failed, but OCR appears to be willing to overlook causation and lay the blame on the school based simply on the failing grade and the implementation problem.

**A quick note on maximizing potential:** Maximizing potential is not the goal of §504 or IDEA. "The IDEA 'does not secure the best education money can buy; it calls upon government, more modestly, to provide an appropriate education for each disabled child.' *Luneford v. District of Columbia Bd. Of Educ.*, 745 F.2d 1577, 1583 (D.C.Cir. 1984). There is 'no requirement that services be sufficient to maximize each child's potential commensurate with the opportunity provided other children.' ....The IDEA guarantees an 'appropriate' education, 'not one that provides everything that might be thought desirable by loving parents.'" *Weixel v. Board of Education of the City of New York*, 33 IDELR 31 (S.D.N.Y. 2000). On a Section 504 claim, the Second Circuit provided this great language. "The heart of J.D.'s opposition to the proposed accommodation is that it was not optimal. However, Section 504 does not require a public school district to provide students with disabilities with

potential-maximizing education, only reasonable accommodations that give those students the same access to the benefits of a public education as all other students.” *J.D. v. Pawlet School District*, 224 F.3d. 60, 33 IDELR 34 (2<sup>nd</sup> Cir. 2000)(note that unlike OCR which imposes a FAPE standard, the court applies a reasonable accommodation standard. Satisfying OCR’s higher standard should typically result in satisfying a court as well).

### III. Some thoughts on implementation of Section 504 Plans.

If the beautifully and carefully crafted Section 504 Plan doesn’t get implemented, the quality of the eligibility decision and the scrutiny given by the group of knowledgeable people (Student Team) to the evaluation data is pretty much wasted. Section 504 Plans must be implemented as written. In short, that means that responsible staff must have access to the Plan, understand it, and have the necessary training and knowledge to implement it. Where teachers or others think changes are required, those changes cannot occur unilaterally (math teacher says “no accommodations for you”) but must be made by the Section 504 Committee. A few examples from OCR letters of finding....

#### A. Get the Section 504 Plan to the folks who will implement it.

**Did everyone see the Section 504 plan? Yes, we did.** *Fayette County (KY) School District*, 40 IDELR 130 (OCR 2003). In response to the parent’s allegation that the student’s teachers were unaware of the contents of the Section 504 plan, the district provided OCR with evidence to the contrary. Each of the student’s teachers had initialed the plan to show their receipt. The principal indicated that by initialing the plan, the teachers verified not only their receipt of the plan, but also their understanding that the accommodations had to be implemented. Further, each of the teachers was sent an email at the beginning of the school year reminding them of the plan. No violation was found.

**When the Plan didn’t follow the student to in-school suspension...** *Norfolk (VA) City Public Schools*, 46 IDELR 21 (OCR 2005). The parent of a student with ADHD and depression alleged discrimination with respect to the lack of Section 504 plan implementation during his time in in-school suspension (ISS). In pertinent part, the plan called for the use of “subtle cueing strategies, such as questioning, eye contact, and other encouragements” to assist the student to focus and stay on task, and provide study guides, graphic organizers and other strategies to help him develop self-management skills. ISS was structured as follows: each student assigned to ISS was required to complete a daily discipline packet (which should take around 45 minutes), and then move on to schoolwork provided by the student’s classroom teachers. Where no schoolwork is provided, the student completes additional sections of the discipline packet. **No policies or procedures are in place to dictate how the school will meet the needs of Section 504 students or implement 504 plans in the ISS setting.**

OCR determined that the ISS teacher was unaware that the student was 504-eligible, and thus, did not use the strategies in the student’s plan to keep him on task. OCR further concluded that the “strategies” utilized by the ISS teacher “appeared to exacerbate the Student’s frequent inability to concentrate on his work and compound his behavioral difficulties.” According to the ISS teacher, work did not always follow a student to ISS immediately, and it was ultimately the student’s responsibility to make sure he had work from each of his teachers. *The ISS teacher was unsure whether this student ever completed any of the assignments received from teachers while in ISS.*

OCR found some violations. **It determined that the ISS teacher could not have implemented the 504 Plan, as the teacher had no knowledge of the student’s eligibility or the plan’s existence.** Further, the policy of placing the responsibility on the student to ensure coursework was received from teachers makes little sense in the context of this student, “and seems to run counter to the substance and objectives of his Section 504 plan.”

*A little commentary:* While the decision makes perfect sense in the context of a school desiring not to count ISS days as days of removal, it would have been helpful for OCR to have included the reminder that the school was always free to use its 10 FAPE-free days in ISS, and thus not comply with the 504 plan's requirements. In this case, however, it appears that due to the number of total removals (15 days of ISS and 8 days of out of school removals) that ship had sailed.

**What happens to disciplinary changes of placement when the 504 plan isn't implemented?** *Banning (CA) Unified School District*, 40 IDELR 77 (OCR–San Francisco 2003). Although a Student with ADHD made the transition from elementary to middle school, the Student's 504 plan did not. For seven months in middle school, the plan was not implemented, despite the fact that the student was involved in a variety of misbehaviors. When the student was recommended for expulsion in December for possession of a weapon at school, the proposed action was stopped in its tracks by manifestation determination: the school did not proceed with the expulsion, as the student's plan had not been implemented. **OCR concluded that the District violated 504 by failing to implement the plan but acted appropriately by stopping the expulsion.** By way of resolution, the school provided OCR with assurances that receiving schools would be notified in advance of the enrollment of a 504 student, and incoming 504 Students' plans would be implemented immediately.

**Can the school wait a few weeks after school starts to distribute Section 504 Plans to the teachers?** While high school campuses in particular have a difficult time keeping up with plan distribution early in a semester or school year as students change schedules and classes, OCR is not sympathetic. *See, for example, Hoke County (NC) Schools*, 114 LRP 36327 (OCR 2014) (“during the investigation of this complaint OCR found that the School's Section 504 Coordinator was not typically communicating with the teachers of students with Section 504 plans about the disability-related aids and services each student needed. Instead the 504 Coordinator was waiting until a few weeks into the school year.” This practice could result in the school's failure to deliver required Section 504 Plan services to students. “Once this concern was identified, the District took immediate action. The District's Executive Director for Student Support Services issued a memo to all District Section 504 Coordinators on January 13, 2014, setting the start of the school year or start of the semester as the deadline to make teachers aware of the Section 504 Plans in place for their students.”

*A little commentary:* This is not an isolated incident as OCR has consistently expressed its expectation that IEPs and 504 Plans should be in the hands of teachers as the school year begins and should promptly follow students to new classes and teachers when schedule changes occur.

## **B. Make sure folks understand the Plan.**

**The compliance disaster: Why a clearly written Plan matters.** *Corunna (MI) Public Schools*, 44 IDELR 16 (OCR–Cleveland 2005). Despite having a 504 meeting to address the student's difficulty completing assignments and maintaining appropriate behavior, little changed for the student. Weekly progress reports ordered by the plan were completed perhaps twice, and then were never completed again. The parent reported that she never received a completed report. Likewise, a behavior plan requiring “Consistent redirection, limits, and consequences” was created, but had little if any effect as the student was suspended home for roughly 9½ days, together with a disputed number of removals from class and in-school suspensions for insubordination and disruption. While the district attempted to downplay the removals from class, staff explanations and campus discipline policy were found by OCR to be “inconsistent.” **The school eventually admitted that the student had been completely excluded from science class, and was serving as a “teacher's helper” during that period in another classroom, for no credit.** OCR determined that this exclusion from science, coupled with the out-of-school suspensions was a significant change in placement that should have resulted in a manifestation determination, but did not.



OCR concluded that the failure to provide the weekly progress report was a FAPE violation, and the significant change in placement without manifestation was also a 504 violation. The District will offer the Student tutoring and the chance to makeup assignments and tests missed for the six-month period of the violations, and the District will provide in-service training on 504 requirements to high school staff, administration and the 504 Coordinator.

*A little commentary:* Cases like this can be very helpful for understanding why process matters, and why little things like clearly written plans are critical. Note the lessons.

**(1) Elements of the plan should be reviewed prior to ending the meeting.** Here, several folks on the committee didn't realize decisions had been made, and the recorder of committee decisions didn't understand what was happening.

“OCR learned that the RESD psychologist had been the person who recorded the 504 team's decisions in the 504 Plan, **although she could not recall most of the discussion from the meeting and did not know specifically what the team had decided in terms of services and aids for the student.** Several witnesses described the discussion at the 504 meeting as casual brainstorming.” (Emphasis added).

Not surprisingly, there were a variety of theories on what the plan meant. Since OCR conducted an onsite investigation, the chaos was nicely documented.

“OCR interviewed each attendee of the 504 meeting about what the weekly progress reports provision meant. The District participants varied as to what this provision required. Some said the Student was to pick up a weekly progress report form from the office and take it around to his teachers for them to fill out. Some of the teachers were supposed to email the Student's parents about progress, although several believed they did not have to continue to use email if the parents did not respond. Two of the teachers believed the weekly report provision was optional. One teacher thought he was to fill out the weekly forms on his own and give them to the student to take home. The Complainant told OCR that the team had agreed to email a weekly report. The Student said he was supposed to get the form from the office each week but he always forgot.”

Here's a shock– “All agree that no weekly reports were issued after the first couple of weeks following the 504 meeting.”

**(2) What about implementation by folks not at the meeting?** While attending this meeting certainly didn't guarantee an understanding of what was required, those who were required to implement the plan but were not in attendance at the meeting were really in a tough spot. Says OCR

“The assistant principal at the high school who was responsible for overseeing the implementation of the plan told OCR that he never gave the student's teachers copies of the plan. When asked how he informed the teacher who was not present at the 504 meeting of the provisions of the 504 plan, the assistant principal said he assumed another teacher would tell that teacher what was discussed.”

*See also, Fremont Unified School District*, 42 IDELR 149 (SEA CA. 2005). Parent of a student with a central auditory processing disorder and dyslexia sought due process when the IEP (and consequently the school's provision of special education services) did not accurately reflect the IEP Team's decision. The Hearing Officer noted that there was general agreement among the witnesses that the IEP was written in a confusing manner. **The confusion was heightened due to changes in personnel, and provision of services by staff that had not attended the meetings that resulted in the confusing**

**IEP.** Said the Hearing Officer: “The IEP is a written blueprint for the education of a student with a disability that must be capable of being read and understood by the professionals responsible for implementing agreed-upon services.... Moreover, the necessity for an IEP that can stand alone and be clearly understood is apparent from the legislative importance placed on the dissemination of this document [to those who will implement it].”). The Section 504 result is the same. The 504 Plan generated by the Student Team should be clear and accurately reflect the services and accommodations agreed to be the Team. The Plan should be written such that anyone not attending the meeting can read it and understand what is to be provided.

**Sometimes the school and parent have different interpretations of plan language.** In a complaint from Wisconsin, the parent alleges that the plan did not define preferential seating, and that the teacher failed to provide positive written comments, despite a modification requiring positive feedback. The parent believed that preferential seating meant that the student would sit in the front row in front of the teacher’s desk. Instead, the student was placed in the row adjacent to the righthand chalkboard that the teacher used for class presentations. The parent’s expectation was based on where the teacher stood during parent orientation, and not on day-to-day classroom activity. On the issue of motivational strategies, the teacher made positive verbal statements to the student as required, as well as discrete notes on weekly tests. OCR found no violation for the failure to be more specific and determined that the District had acted consistently with the plan. *Nicolet (WI) Union High School District*, 37 IDELR 98 (OCR 2002).

*A little commentary:* While the result is certainly encouraging, the fact that the school had to respond to an OCR complaint is telling of the relationship with the parent. While there are certainly parents who cannot be satisfied, the author wonders whether a friendly conversation with the teacher or a campus administrator explaining the plan could have prevented the complaint. *See also, Meridian (IL) Community Unit School District 101*, 42 IDELR 90 (OCR– Chicago 2004)(“With respect to the items in the complaint that allegedly were not implemented, the evidence shows that in those instances, **the Complainant misinterpreted the scope and extent of the terms of the IEP.** The IEP did state that the District was to modify assignments, but it did not describe how the assignments would be modified and it did not require Student A to complete 70% of the work assigned to his classmates. Additionally, the IEP did not require the District to provide Student A with the option of oral testing or offer examinations in an alternative class. Therefore, the District did not fail to implement those items, as alleged.”).

**A good example of process for distribution of the plan and ensuring understanding.** *Wayne (NY) Central School District*, 43 IDELR 257 (OCR– New York 2005). The parent complained that elements of the student’s 504 plan lacked sufficient specificity to provide the student appropriate services. For example, while the plan provided for extended time to process auditory and visual information, the plan did not detail how much extra time would be provided. In responding to the complaint, OCR analyzed at great length the process through which plans were distributed to teacher and implementation questions were addressed.

“OCR was advised that typically the principal or case manager distributes the Plan to the teachers responsible for implementing it. A case manager is also assigned to provide information and support to teachers regarding the Plan’s implementation. Within the first or second week of school, the case manager meets with the teachers and other staff who will work with the student to review the Plan’s provisions, the student’s specific needs, and strategies to meet those needs.”

Importantly, interviews with the Student’s teachers revealed that this process had, in fact, occurred, and that teachers were provided with an opportunity to ask questions about the plan and implementation. “All teachers interviewed indicated that they understood the Plan and were implementing its requirements. In addition, all District staff was essentially consistent in their understanding of the Plan’s requirements.”

In this context, OCR looked at the lack of specificity as a calculated effort by the school to refine its methods and strategies for this particular student. Says OCR

“During the course of the school year, additional conversations were held with the Student’s case manager in order to refine the methods and strategies utilized for the Student. **OCR’s investigation revealed that the Plan’s implementation required the teachers to continue to modify their strategies in order to determine what method would best meet the Student’s needs.** For example, the Student routinely received extra time to study her spelling words, however, it took a few attempts at the start of the school year before the teacher was able to determine the exact amount of extra time needed by the student to be successful on spelling tests. Similar adjustments occurred with other Section 504 plan requirements. This process of trial and error took from one to one and a half months with some of the Plan provisions. However, the generality of some of the Section 504 Plan’s provisions allowed teachers that flexibility.”

Put simply, the flexibility of the plan allowed for better, more individualized services for the student. The lack of specifics did not hurt delivery of services. “Rather, in certain instances the general language in the Plan afforded teachers the latitude needed to provide an individualized program based on the Student’s needs.” District prevails.

*A little commentary:* So how do we know if the plan is vague or if we are providing necessary flexibility? Look at what OCR was concerned about: (1) The teachers understood the plan. They were provided with a timely copy, attended a meeting with the case manager regarding the student, his needs, and the plan, and were able to ask question. Not only did the teachers understand the plan, there was a process in place to ensure that they understood; (2) The teachers worked with each other and the parent to clarify and properly implement the plan. When questions arose, the questions were asked and answered in collaboration with other educators and the parent; and (3) The student was academically successful (and there appeared to be no emotional, social or behavioral troubles to address). Nothing says “appropriate services” quite like the student’s success. In short, by demonstrating a sophisticated compliance process, the district was able to gain flexibility through a less-detailed 504 plan. The school could be trusted to use the flexibility built into the Plan because of the manner in which it exercised its discretion (teachers collaborating, talking with parent, and adapting on the fly based on this particular student’s needs, consistent with the Plan).

### **C. They have it... they understand it... now they need to *do it*.**

**Somebody on the campus should always be looking for trouble....** The duty to provide FAPE is a school duty. It’s not the parent’s job to keep an eye on the student’s program and services and alert the school when services are missing or problems develop. Schools have unsuccessfully tried to make that argument, but the courts have yet to buy in. For example, when a school argued to the 3<sup>rd</sup> Circuit that it would have corrected its IDEA mistakes earlier if the parent had only told the school about the mistakes, the 3<sup>rd</sup> Circuit was clearly unimpressed. “[A] **child’s entitlement to special education should not depend upon the vigilance of the parents** (who may not be sufficiently sophisticated to comprehend the problem) nor be abridged because the district’s behavior did not rise to the level of slothfulness or bad faith. Rather, it is the responsibility of the child’s teachers, therapists, and administrators—and of the multidisciplinary team that annually evaluates the student’s progress—to ascertain the child’s educational needs, respond to deficiencies, and place him or her accordingly.” *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3<sup>rd</sup> Cir. 1996), *cert. den’d*, 519 U.S. 866 (1996); *See also, Wissahickon School District*, 35 IDELR 200 (Pa. Review Panel 2001)(“**The parent’s incomplete vigilance or sophistication does not negate the district’s reviewing responsibility.**”). The same is true in the Section 504 world.

Think of this as a logical continuation of child find—district personnel should always be watching for students who, *despite Section 504 eligibility and a Plan*, are not receiving equal opportunity to participate and benefit or have their opportunity threatened by absences, inappropriate implementation of the Plan, personnel difficulties, etc. The Student Team cannot have sole responsibility for this supervision. Months may pass between meetings, in which time plenty of things can and will go wrong. Each campus should have some sort of process in place so that each Section 504 student is accounted for at various points during the semester. Whether it's a supervisor, counselor, teacher, or administrator is not really the important issue. What matters is that someone knowledgeable about 504 and this student's plan is *accountable and watching* to ensure that the Plan is implemented and that there are no warning signs of trouble (mounting absences, disciplinary removals piling up, work refusal, parent complaints, student not completing or turning in work, etc.) left unaddressed. The earlier a problem is spotted, the better, as the remedy will be proportionately less difficult now than were the school to wait for a parent to notice the issue and invite a hearing officer to come up with a remedy.

It is always in the school's best interests to discover a problem first. Not only will the school have the ability to resolve the issue before there is greater damage, the school will also avoid having to contend with a parent angry about a lack of services AND the school's lack of attention to the student.

**Inadequate staff training to implement the Behavior Plan.** *New Hampshire School Administrative Unit #15 (NH)*, 41 IDELR 70 (OCR– Boston 2003). While OCR commended the school on its efforts to keep quality documentation and its “exceptional efforts” to maintain students in the LRE, the school still got dinged for a couple of 504 violations on personnel training and readiness to implement plans. OCR observed that there were delays in implementing student plans because, *prior to the first day of school*, a classroom teacher and aide did not have sufficient information” about the specific nature of [the student's] needs based on his disability nor sufficient information about how to implement his behavior management plan. **For example, despite the plan calling for the use of physical intervention for safety purposes (restraint or therapeutic holding), neither the classroom teacher nor the aide had received training in physical interventions or restraint techniques prior to the beginning of the school year.** By way of resolution, the school agreed to provide training to staff prior to the first day of school on the requirements of 504 and how to ensure that plans are implemented.

**Failure to implement accommodations as retaliation.** *Ewing (NJ) Public Schools*, 53 IDELR 166 (OCR 2009). The parent alleged three types of failure by school staff to implement the student's Section 504 Plan. OCR found the school in violation on two of the three allegations. Several teachers had failed to check or otherwise assist the student in maintaining his agenda, and another teacher failed to properly contact the student's parent by phone or e-mail with progress reports as required by the plan. To resolve the complaint, the district agreed to monitor plan implementation.

*A little commentary:* What makes this case truly interesting is that the parent had filed an OCR complaint against the school in the fall of 2003. His fourth allegation in this filing is that the teachers were refusing to comply with the plan in retaliation for his previous filing six years earlier. *If only they had remembered, thinks the school attorney, perhaps they would have made more of an effort knowing that the parent would be watching.* Compliance is a school duty, not the duty of the parent. It does no good to identify, evaluate, and create a plan for the student if the plan will not be implemented. OCR found no retaliation.

**Perfect implementation of the plan is not required.** *North Reading (MA) Public Schools*, 42 IDELR 276 (OCR 2004). In response to a parent complaint that the district was not consistently implementing the required assignment notebook, OCR determined that a majority of the time the district complied. While there were times when teachers failed to initial the student's assignment notebook, “based on the totality of the evidence” the occasional failure did not result in a denial of FAPE for the student.

*A little commentary:* Since the accommodations at issue were focused on academics, it's important to note that (1) the student was not failing to make progress in academic skill areas, and (2) there was no reference to either falling or failing grades. Either of those factors, if present, could have changed the result.

**In the following cases, the Plan (whether IEP or 504 Plan) was received, but either was ignored or otherwise was not implemented. These are the kinds of problems that hamper implementation.**

**The bus was late a lot.** When a bus driver decided, all by himself, to change the bus route, a thirteen-year-old student with a disability arrived thirty-minutes late to his private school placement sixty-eight times. The parent sought the entire thirty-four hours of education missed in compensatory services, but was only granted seventeen hours by the hearing officer. A review panel gave the parent all thirty-four. *Southeast Delco School District*, 34 IDELR 108 (Pa. Review Panel 2001). *See also, Treutlen County (GA) Schools*, 33 IDELR 218 (SEA GA 2000)(School ordered to provide compensatory education due to school bus' late arrival and early departure. The student at issue was hearing-impaired, and due to the bus ride, arrived twenty-five minutes after the tardy bell and left *an hour and fifteen minutes* prior to the end of the school day).

**Failure to provide appropriate accommodations.** The IEP for a special education student with autism and ADHD required as a testing accommodation that the student be provided "recognition rather than essay tests." The accommodation was not provided in the English class, apparently resulting in failing grades in English. As a remedy, a Minnesota ALJ ordered that the student's case manager work with teachers to determine how to appropriately adapt essay tests for the student and that the student must be given the opportunity to retake the English *Antigone* essay test in an appropriate format. *Fillmore Central ISD #2198*, 107 LRP 28076 (SEA MN 2006).

**How might that error that be remedied?** *Seattle School District*, 102 LRP 2674 (SEA WA 2000). "To the extent the student received failing grades or was considered to have failed to complete classes due to absences or failure to complete assignments, these courses should be reviewed with the involved teacher, the student and advocate and the student allowed to complete work where appropriate to change [his] grade or obtain class completion."

**Budget cuts and lack of personnel.** The unfortunate result of budget cuts appears to be a deprivation of services to two students as special education positions were cut across the district. The two students at issue were denied thousands of minutes of direct resource services (1,900 minutes for one student and almost 5,000 minutes for the other) over the course of the 2003-4 school year. Both suffered a drop in grades. Further, no progress reports were sent, no assignments were shortened, and no consultation occurred between resource teachers and regular education as required by their IEPs. As a remedy, the ALJ required the district to provide both students the opportunity to make up any classes the students failed or did not complete. Further, the district was required to review the students' credits for graduation and put together a plan for the students to both graduate in a timely manner, including the provision of additional resource time to make-up or complete classes. *Cloquet ISD #094*, 106 LRP 14319 (SEA MN 2004).

*A little commentary:* It is interesting to note the following paragraph from the decision with respect to the link between the lack of services and failing or incomplete class work. "It is reasonable to conclude both Student A and Student B suffered educational harm as a result of the District's failure to timely provide the Students resource services and adaptations as provided for in the Students' IEPs. This is evidenced, in part, by both Students' cumulative grade point averages being lowered as a result of Term 1 and Term 2 grades." Note that there is no effort to screen out other factors that may have contributed to the slide in grades and incomplete work. Instead, the ALJ seems content to assume a direct connection between the failure to provide services and the impact. Why? One theory: the services were so blatantly neglected, why give the school benefit of the doubt?

Another interesting bit of language addressed the school's argument that the students could have gone to the resource room on their own during their open lunch or study time but did not voluntarily take advantage of the opportunity. **Said the ALJ: The students' not availing themselves of resource during their free time "does not negate the District's obligation to provide Student A and Student B services in accordance with their IEPs."** (Emphasis added).

**Teacher puts the student on pass/fail status.** A business education class (BEC) teacher failed to implement a portion of the student's IEP that called for extended time on tests and other assignments. Specifically, the teacher refused to implement the provision with respect to computer keyboarding tests. "The BEC teacher explained that proficiency on the computer keyboard necessarily involves testing for speed and accuracy and that to allow extended time for testing in this situation would have defeated the test's stated purpose." **While the hearing officer was sympathetic to the teacher's concerns, the self-help response was not appropriate.** Instead of the teacher refusing to implement the provision, the IEP Team should have addressed the issue. Similarly, the teacher unilaterally denied the student the opportunity to earn a letter grade, and instead, applied a pass/fail standard. "The complainant contended that the student should have been able to earn a letter grade in the BEC. The BEC teacher contends, however, that had she offered the student a letter grade, the student would have failed the course due to the student's inability to master essential keyboarding skills, which is an essential element of the course. This dispute regarding what grading system to use should have been resolved through the IEPC meeting with attendant procedural safeguards." *Ann Arbor (MI) Public School District*, 30 IDELR 405 (SEA MI 1998).

*A little commentary:* Unfortunately, it is not uncommon for regular education teachers to take issue with grades where the student is receiving significant accommodations but is to be graded like everyone else. The Michigan teacher took matters into her own hands (and had her hands slapped). By the way, if the student would fail under a letter-grade standard, would not the student also fail on a pass/fail standard? *What was the teacher really doing here?*

**Can the principal veto a Section 504 Plan?** No. The group of knowledgeable people (Section 504 Committee/Student Team) determines eligibility and creates a plan when required. Federal law provides this mechanism for creation and, consequently, changes or removal of plan elements. Campus principals have no veto right, even if what is ordered is expensive or inconvenient. In *Modoc County (CA) Office of Education*, 24 IDELR 580 (OCR 1996), OCR dealt with a school administration exercising coercive control over Committees, resulting in students not receiving the services determined necessary for FAPE.

"The complainant, other parents of disabled students, and former staff told OCR that they have observed or directly experienced ongoing manipulation of the IEP process by MCOE officials in an effort to forgo providing services and cutting costs. Many situations involve MCOE officials controlling IEP team decisions, disapproving requests or suggestions with no explanation, imposing procedural delays, intimidating staff and parents, and instructing staff to generalize IEPs... [These officials] presented no educational justification for their decisions and accepted no arguments."

Evaluation and placement decisions made by anyone other than the appropriate IEP team or Section 504 Committee/Student Team are in violation of 34 C.F.R. §104.35(c). While the administrator cannot make the decision, the administrator certainly can provide input about problems and possible solutions.

**Can the student get Section 504 FAPE even if implementation is a little lacking?** It's possible to make some mistakes and survive on the FAPE issue. In a 2003 decision, the Office for Civil Rights analyzed a claim that the school had failed to implement modifications for final exams, resulting in

denial of the Section 504 FAPE. Despite finding that accommodations had not been implemented for the student's finals in several classes, OCR found no violation.

**“When a district fails to make a modification that has been deemed necessary by a group of knowledgeable persons pursuant to Section 504, e.g., failing to provide an examination of reduced length or modified format, such failure does not in and of itself constitute a denial of FAPE.** OCR has determined that it did not constitute a denial of FAPE in this instance. A review of the [student's] educational record while attending the WDISD reveals that his course grades for several years are mostly A's and B's. Following the 2001-2002 school year, the AIP advanced to the 12<sup>th</sup> grade. The AIP's passing grades and advancement from grade to-grade are evidence that the AIP has not been denied a FAPE. Therefore, OCR has determined that there is insufficient evidence to support a finding of a violation of Section 504 or Title II.... *White Deer (TX) ISD*, 38 IDELR 20 (OCR 2002)(“AIP” is OCR-speak for “alleged injured party,” or student). It didn't hurt that the student did very well on the unmodified finals....

#### IV. Some final thoughts....

##### A. Not All Section 504-Eligible Students Receive a Plan

To be eligible under Section 504 (to be a student with a disability), a student must be both “qualified” (the student is within the age range in which services are provided to disabled and nondisabled students under state law, *See 34 CFR §104.3(l)(2)*), and “handicapped.” Pursuant to 34 CFR §104.3(j)(1), “Handicapped persons means any person who

- (i) has a physical or mental impairment which substantially limits one or more major life activities;
- (ii) has a record of such an impairment; or
- (iii) is regarded as having such an impairment.”

For students eligible under prong one who are in need of services, a Section 504 Plan is created in order to provide the student a free appropriate public education. The Section 504 FAPE is focused on leveling the playing field. “For the purpose of this subpart, the provision of an appropriate education is **the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met** and (ii) are based upon adherence to procedures that satisfy the requirements of Sec. 104.34, 104.35, and 104.36.” 34 CFR §104.33(b) (emphasis added). In a 1992 Senior Staff Memorandum, OCR clarified that the FAPE duty applies to students eligible under prong one, but not prongs two and three.

“The reason for the inclusion of the second and third prongs of the definition is explained in the regulation at Section 104.3(j)(2)(iii) and (iv), and is further clarified in Appendix A at #3. **Those two prongs of the definition are legal fictions. They are meant to reach situations where individuals either never were or are not currently handicapped, but are treated by others as if they were.** For instance, a person with severe facial scarring may be denied a job because she is ‘regarded as’ handicapped. A person with a history of mental illness may be denied admission to college because of that ‘record’ of a handicap. The persons are not, in fact, handicapped, but have been treated by others as if they were. It is the negative action taken based on the perception or the record that entitles a person to protection against discrimination on the basis of the assumptions of others.

The use of these prongs of the definition of handicapped person arises most often in the area of employment, and sometimes in the area of postsecondary education. **It is rare for these prongs to be used in elementary and secondary student cases. They cannot be the basis upon which the requirement for FAPE is triggered.** Logically, since the student is not, in fact, mentally or physically handicapped, there can be no need for special education or related aids and services.” *OCR*

OCR confirms this position in the Revised Q&A, Question 37. **“In public elementary and secondary schools, unless a student actually has an impairment that substantially limits a major life activity, the mere fact that a student has a “record of” or is “regarded as” disabled is insufficient, in itself, to trigger those Section 504 protections that require the provision of a free appropriate public education (FAPE).”** The duty to provide FAPE only exists where there is a current, disability-related need for services.

**Technical Eligibility.** Traditional pre-ADAAA Section 504 eligibility in most school districts was premised on the notion that the Section 504 prong one eligibility requirements were met, and the student needed Section 504 accommodations or services in order for his needs to be met as adequately as his nondisabled peers. After all, why would we evaluate a student for Section 504 unless we thought that the student needed services? Consequently, if the student was found not to need services during the evaluation, he was likely determined ineligible for Section 504. The logic of nondiscrimination demanded that result: If the student did not need accommodations because of his impairment, how is he denied equal participation and benefit because of the impairment?

The ADAAA’s provision on impairments in remission coincides with an interesting OCR criticism of traditional eligibility thinking. In this decision, OCR separated eligibility questions from the question of whether the student needs a Section 504 plan. *See, e.g., Memphis (MI) Cmty. Sch.*, 54 IDELR 61 (OCR 2009) (**“The procedures also state that a student is not eligible under Section 504 as a student with a disability if the student does not need Section 504 services in order for the student’s educational needs to be met, which conflates the determination of disability with placement and services decisions, which should be separate.”**). This bit of language from OCR seems to support the position that a student can be technically eligible for Section 504 under prong one, but not be eligible for services, for example, because the impairment is in remission and no services are necessary for the student to receive FAPE.

**The “technically eligible” student is one who despite meeting Section 504 eligibility criteria (she has a physical or mental impairment that substantially limits one or more major life activities), does not need services from the school.** Three types of technically eligible students appear possible: (1) the student with an impairment in remission (who receives no services because the dormant impairment does not create a current need for services); (2) the student whose needs are met through mitigating measures that he or she controls (so services from the school are not required to meet the student’s needs); and (3) students for whom parents have refused or revoked consent for Section 504 services. Here’s an OCR example of the mitigating “type” of technically eligible student.

“For example, suppose a student is diagnosed with severe asthma that is a disability because it substantially limits the major life activity of breathing and the function of the respiratory system. However, based on the evaluation, the student does not need any special education or related service as a result of the disability. This student fully participates in her school’s regular physical education program and in extracurricular sports; she does not need help administering her medicine; and she does not require any modifications to the school’s policies, practices, or procedures. The school district is not obligated to provide the student with any additional services. The student is still a person with a disability, however, and therefore remains protected by the **general nondiscrimination provisions** of Section 504 and Title II.” 2012 DCL, p. 9, Question 11 (emphasis added).

**So what does the technically eligible student get from Section 504?** The technically eligible student would get no Section 504 Plan because there is no need for services, but what about procedural protections? Prior to the 2012 guidance letter, the author assumed that the technically eligible student would receive manifestation determination, procedural safeguards, periodic reevaluation or more often as needed, as well as the nondiscrimination protections of Section 504. Should need for a 504 plan



develop, the Section 504 Committee would reconvene and develop an appropriate Section 504 services plan at that time. Note, however, that in OCR's severe asthma example the student receives no services and remains protected by the *general nondiscrimination provisions* of Section 504 and the ADA. In the July 2016 ADHD Resource Guide, OCR added a bit more detail. **The technically eligible student “is still a person with a disability, because the student has an impairment that substantially limits a major life activity, and so is protected by Section 504’s general nondiscrimination prohibitions (e.g., no retaliation, harassment, unlawful different treatment, etc.).”** *Students with ADHD and Section 504: A Resource Guide*, 68 IDELR 52 (July 2016)(p. 25).

## **B. A Special Education IEP AND a Section 504 Plan?**

According to the U.S. Department of Education, students determined to be IDEA-eligible are also eligible under §504. “In order to be eligible for services under the IDEA, a child must be found to have one or more of the 13 disability categories specified *and* must also be found to need special education. OCR can not conceive of any situation in which these children would not also be entitled to the protections extended by Section 504.” *Letter to Mentink*, 19 IDELR 1127 (OCR 1993). The fact that a student is eligible for Section 504 protections and IDEA protections does not mean that he can be served by a Section 504 plan since that Section 504 plan is neither created nor maintained through the more stringent procedural protections of the IDEA. A school attempting to comply with its IDEA duties to a child by offering a Section 504 plan denies the IDEA-eligible student the procedural protections due under IDEA. OCR's online Q&A addresses the issue quite simply.

“If a student is eligible for services under both the IDEA and Section 504, must a school district develop both an individualized education program (IEP) under the IDEA and a Section 504 plan under Section 504? No. If a student is eligible under IDEA, he or she must have an IEP. Under the Section 504 regulations, one way to meet Section 504 requirements for a free appropriate public education is to implement an IEP.” Revised Q&A, Question 36.

In other words, a Section 504 plan will not satisfy the school's duty to serve an IDEA-eligible student due an IEP. The IDEA student receives an IEP and is also entitled to the nondiscrimination protections of Section 504 and the ADA.

*A little commentary:* In states where gifted students also receive IEPs as “exceptional students,” this answer may be different. Talk to your school attorney about impact of state law on this issue.

## **C. Section 504 Plan & IEPs in “Accelerated Classes”**

Any discussion of accommodations in accelerated classes (here, “accelerated” is OCR shorthand for Advanced Placement, Honors, Magnet, Gifted, etc.) must begin with recognition of two competing, but polar opposite, assumptions. The first, held by some school folks, is that accommodations are not possible in accelerated classes. That position is rejected outright by a letter from OCR (with OSEP input) dated December 26, 2007, which clarified the basic Section 504 duty with respect to accelerated classes. Interestingly, the letter does not directly address the *other* assumption, commonly articulated by some parents, that students with disabilities are entitled to any accommodation they might need to be successful in accelerated classes, regardless of the effect of the accommodation on the “accelerated” nature of the class. The letter does seem to recognize limits to accommodations, but does not provide the clear guidance that schools desire when faced with unreasonable demands that may dilute above-grade level curriculum. *Dear Colleague Letter: Access by Students with Disabilities to Accelerated Programs*, 108 LRP 69569 (OCR 12/26/07)(Hereinafter, “2007 DCL”). Note that state laws that may provide additional requirements are not addressed here. Check with your school attorney.

**1. IDEA & §504 students do not give up their services and accommodations as a condition of attendance in accelerated programs.** In its December 2007 letter, OCR focused on two major concerns with respect to disability discrimination in accelerated programs. **“Specifically, it has been reported that some schools and school districts have refused to allow qualified students with disabilities to participate in such programs. Similarly, we are informed of schools and school districts that, as a condition of participation in such programs, have required qualified students with disabilities to give up the services that have been designed to meet their individual needs. These practices are inconsistent with Federal law, and the Office for Civil Rights (OCR) in the U.S. Department of Education will continue to act promptly to remedy such violations where they occur.”** *Id* [Emphasis added]. Further, “conditioning participation in accelerated classes or programs by qualified students with disabilities on the forfeiture of necessary special education or related aids and services amounts to a denial of FAPE under both Part B of the IDEA and Section 504.” *Id*. OCR has enforced this position in *Wilson County (TN) School District*, 50 IDELR 230 (OCR 2008) (“the evidence shows that the District’s decision was based on an erroneous interpretation and application of Section 504 requirements that resulted in an automatic denial of academic accommodations for the student in his honors class.”).

**2. IEPs, Section 504 Plans & Accelerated Classes.** While OCR’s declaration that accommodations are required in accelerated classes is not surprising (the notion that no accommodation would ever be required in an accelerated class seems indefensible in the context of a law that seeks equal participation and benefit in a recipient’s programs and activities), OCR takes the position that accelerated classes are “generally” part of FAPE. That position is interesting, as it means that accommodation in accelerated classes is not then subject to the limitations of “reasonable accommodation,” but is governed by the higher FAPE standard.

“Participation by a student with a disability in an accelerated class or program **generally** would be considered part of the regular education or the regular classes referenced in the Section 504 and the IDEA regulations. **Thus, if a qualified student with a disability requires related aids and services to participate in a regular education class or program, then a school cannot deny that student the needed related aids and services in an accelerated class or program.** For example, if a student’s IEP or plan under Section 504 provides for Braille materials in order to participate in the regular education program and she enrolls in an accelerated or advanced history class, then she also must receive Braille materials for that class. The same would be true for other needed related aids and services such as extended time on tests or the use of a computer to take notes.” 2007 DCL.

### **So, what does this mean?**

1. Accommodations or services the student receives through §504 or IDEA in a regular education class or program are available to the student in an accelerated program.
2. As a corollary, a student with an IEP or §504 plan cannot be denied access to an accelerated class or program because he has an IEP or §504 plan, nor can the student’s admission to the accelerated class be conditioned on the student giving up things he receives from a 504 plan or IEP.

As OCR concluded “The requirement for individualized determinations is violated when schools ignore the student’s individual needs and automatically deny a qualified student with a disability needed related aids and services in an accelerated class or program.” *Id. See also Wilson County (TN) Sch. Dist.*, 50 IDELR 230 (OCR 2008) (OCR finds a §504 violation when the school refused to apply a student’s existing §504 academic accommodations to his honors classes, including extra time on class work, homework, and routine classroom tests, although he continued to receive the plan’s accommodations in his regular classes).

3. There is no indication in the OCR analysis/guidance that the student must be provided additional accommodations or services due to his participation in accelerated classes.

On the contrary, **the example provided in the OCR letter clearly envisions that the accommodations that the student was already receiving in regular classes will be those she receives when she enrolls in an accelerated or advanced history class.** Consequently, a student who wants additional accommodations (beyond those she currently receives) in order to tackle the more difficult subject matter, speed or coverage of the accelerated course would appear to have no entitlement to expanded accommodations based on the move to an accelerated class. Unfortunately, this was the only example provided by the 2007 letter, so whether this limitation is intended or is an unfortunate implication of the chosen example is unclear. Note, however, that in the *Wilson County* case, the result seems to follow that in the example. OCR's concern in *Wilson County* was that accommodations in the student's plan at the time he began accelerated classes were not applied to the accelerated classes. A clear statement of this rule from OCR would be helpful, especially as schools are confronted with parents demanding additional supports in the face of more difficult demands in accelerated classes.

4. There appears to be no concern over whether the accommodations or services provided in the regular class, when provided in the accelerated class, will still be appropriate.

**Accelerated classes, by definition, are meant to be different from regular classes of the same subject matter.** Accelerated classes typically move at a faster pace, involve more reading and writing, or can be otherwise more intense versions of their regular education counterparts. In some cases, these classes may also expose the student to curriculum in excess or above a grade-level class of the same subject matter, and may offer weighted grades to encourage participation and in recognition of the greater difficulty of the material. **Strangely, OCR treats grade level curriculum and accelerated curriculum as identical (although there may be significant differences).** While in other contexts OCR recognizes that remedial and special education classes may offer below-grade level curriculum, and accelerated classes may offer above grade level curriculum, OCR acknowledges no difference in curriculum level in this analysis on accommodations. (See, for example, OCR guidance on notations to transcripts to indicate classes with modified or alternative education curriculum, *In Re: Report Cards and Transcripts for Students with Disabilities*, 51 IDELR 50 (OCR 2008) (“**While a transcript may not disclose that a student has a disability or has received special education or related services due to having a disability, a transcript may indicate that a student took classes with a modified or alternate education curriculum. This is consistent with the transcript's purpose of informing postsecondary institutions and prospective employers of a student's academic credentials and achievements.** Transcript notations concerning enrollment in different classes, course content, or curriculum by students with disabilities would be consistent with similar transcript designations for classes such as advanced placement, honors, and basic and remedial instruction, which are provided for both students with and without disabilities, and thus would not violate Section 504 or Title II.”)(emphasis added). OCR appears to assume here that accommodations appropriate in a regular class will not (regardless of the type or scale of the accommodation) take away from the accelerated nature of the class, and thus potentially provide the accommodated student with weighted credit for mere grade-level work. The possibility is not directly addressed in the OCR letter (unless that is the implication of the word “generally” in the 2007 Letter).

#### **D. What about the ADA's Effective Communication regulations?**

An emerging concern arises from the Americans with Disabilities Act's Effective Communication regulations that provide additional protections to individuals with speech, hearing and vision impairments. As part of the nondiscrimination protections of the ADA, specific provision is made for

these three types of communication disorders to ensure that covered individuals enjoy “communication as effective as communication with others.”

1. The District must “ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others.” 28 C.F.R. §35.160(a)(1).
2. The District must “furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.” 28 C.F.R. §35.160(b)(1).
3. In determining what type of auxiliary aid and service is necessary, a school “shall give primary consideration to the requests of the individual with disabilities.” 28 C.F.R. §35.160(b)(2).
4. The District need not, under Title II, “take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.” 28 C.F.R. §35.164.

These regulations, and the complex interaction of Section 504, ADA, and IDEA are addressed in a guidance letter from the U.S. Department of Education’s OSERS, OCR and the Department of Justice. *Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools*, 114 LRP 49205 (DOJ/OCR/OSERS November 12, 2014).